No. 87-1437-CSY
Status: GRANTED

Title: Melvin R. Blanton and Mark D. Fraley, Petitioners
v.
City of North Las Vegas, Nevada

Docketed:
February 26, 1988

Court: Supreme Court of Nevada

Counsel for petitioner: Graves Jr.,John Julian, Watkins,John G.

Counsel for respondent: Woofter,Roy A.

Entry	Date	Note	Proceedings and Orders
1	Feb 26 1988	G	Petition for writ of certiorari filed.
2	Feb 26 1988		Appendix of petitioner Melvin R. Blanton, et al. filed.
3	Mar 30 1988		DISTRIBUTED. April 15, 1988
4	Apr 20 1988	F	Response requested -- TM.
5	May 19 1988		Brief of respondent North Las Vegas, Nevada in opposition filed.
6	May 24 1988		REDISTRIBUTED. June 9, 1988
7	May 27 1988	X	Reply brief of petitioners Melvin R. Blanton, et al. filed.
9	Jun 10 1988		REDISTRIBUTED. June 16, 1988
10	Jun 20 1988		Petition GRANTED.
			**********
11	Aug 4 1988		Brief of petitioners Melvin R. Blanton, et al. filed.
12	Aug 4 1988		Joint appendix filed.
13	Aug 4 1988		Brief amici curiae of ACLU, et al. filed.
14	Aug 12 1988	D	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
15	Aug 29 1988		Brief amicus curiae of City of Las Vegas, Nevada filed.
16	Sep 1 1988		Brief amicus curiae of Louisiana District Attorneys Assn. filed.
17	Sep 1 1988		Brief of respondent City of North Las Vegas, Nevada filed.
18	Sep 2 1988		Brief amicus curiae of United States filed.
19	Sep 2 1988		Brief amicus curiae of New Jersey filed.
20	Sep 2 1988		Brief amicus curiae of Nevada filed.
21	Sep 13 1988		CIRCULATED.
23	Sep 27 1988	X	Reply brief of petitioners Melvin R. Blanton, et al. filed.
22	Oct 3 1988		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
24	Oct 24 1988		SET FOR ARGUMENT. Monday, January 9, 1989. (3rd case) (1 hr.)
25	Oct 27 1988	D	Motion of City of Las Vegas, Nevada, for leave to participate in oral argument as amicus curiae and for divided argument filed.
26	Nov 7 1988		Motion of City of Las Vegas, Nevada, for leave to participate in oral argument as amicus curiae and for divided argument DENIED.
27	Jan 9 1989		ARGUED.

87-1437

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	NSCT. NO. 17948 (Blanton) NSCT. NO. 18065 (Fraley)

On Writ of Certiorari To The
Supreme Court of The State of Nevada

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving under the influence of intoxicating liquor ("D.U.I") under Nevada state law is a "serious" crime allowing a right to jury trial.

II.

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III.
GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

A.

The Date of Judgment Sought to be Reviewed

The Supreme Court of the State of Nevada on December 31, 1987, denied the Appeal of Defendant, Blanton, and further reversed the Order of the Eighth Judicial Court, Clark County, Nevada, granting Defendant, Fraley, a jury trial. Both Defendants were thereby denied jury trials for their D.U.I. offenses. (See Appendix, Tab "A", copy of the Decision).

B.

Date of Order Denying Rehearing

No petition for rehearing was filed by either Defendant in the Supreme Court of Nevada.

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C.

Statutory Provision Conferring Jurisdiction On This Court to Review the Judgment by Writ of Certiorari

28 U.S.C. §1257 provides:

> **State courts; appeal; certiorari**
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the

ground of its being repugnant to the Constitution, treaties of laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

D.

Statutory Provisions

Nevada Revised Statute 484.379 provides:

484.379. Driving while intoxicated: Unlawful acts.

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor; or

(b) Has 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who is an habitual user of or under

the influence of any controlled substance, or is under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

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Nevada Revised Statute 484.3792 provides:

> **484.3792. Driving while intoxicated: Penalties; segregation of offender; probation, suspension of sentence and plea bargaining prohibited; intermittent confinement; consecutive sentences.**
>
> 1. Any person who violates the provisions of NRS 484.379:
>
> (a) For the first offense within 7 years, is guilty of a misdemeanor. Unless he is allowed to undergo treatment as provided in NRS 484.3794, the court shall:
>
> (1) Order him to pay tuition for an educational course on the abuse of alcohol and controlled substances approved by the department and complete the course within the time specified in the order, and the court shall notify the department if he fails to complete the course within the specified time;
>
> (2) Unless the sentence is reduced pursuant to NRS 484.3794, sentence him to

imprisonment for not less than 2 days nor more than 6 months in jail, or to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having violated the provisions of NRS 484.379; and

(3) Fine him not less than $200 nor more than $1,000.

The teacher of the educational course shall evaluate the offender and, if he finds the offender is an abuser of alcohol or controlled substances, he shall promptly report his findings to the court for its use.

(b) For a second offense within 7 years, is guilty of a misdemeanor. Except as provided in NRS 484.3794, the court shall sentence him to imprisonment for not less than 10 days nor more than 6 months in jail and fine him not less than $500 nor more than $1,000.

(c) For a third or subsequent offense within 7 years, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years

and must be further punished by a fine of not less than $2,000 nor more than $5,000. An offender so imprisoned must be segregated insofar as practicable from offenders whose crimes were violent, and must be assigned to an institution of minimum security or, if space is available, to an honor camp, restitution center or similar facility.

2. Any offense which occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

...

3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial.

4. Any term of confinement imposed under the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace, except that a person who is convicted of a second or subsequent offense within 7 years must be confined for at least one segment of not less than 48 consecutive hours. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the offender, but any sentence of 30 days or less must be served within 6 months

after the date of conviction or within 6 months after the date of sentencing if the offender underwent treatment pursuant to NRS 484.3794. Any time for which the offender is confined must consist of not less than 24 consecutive hours.

5. Jail sentences simultaneously imposed under this section and NRS 483.560 or 485.330 must run consecutively.

6. As used in this section, unless the context otherwise requires, "offense" means a violation of NRS 484.379 or 484.3795 or homicide resulting from the driving of a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct.

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Nevada Revised Statute 483.460 provides:

483.460. Mandatory revocation of license, permit or privilege to drive; periods of revocation.

1. Unless otherwise provided by statute, the department shall revoke the license, permit or privilege of any driver upon receiving a record of his conviction of any of the following offenses, when that conviction has become final, and the driver is not eligible for a license, permit or privilege to drive for the period indicated:

(a) For a period of 3 years if the offense is:

(1) Violation of NRS 484.3795 or subsection 2 of NRS 484.377 or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance.

(2) A third or subsequent violation within 7 years of NRS 484.379.

(b) For a period of 1 year if the offense is:

(1) Any other manslaughter resulting from the driving of a motor vehicle or felony in the commission of which a motor vehicle is used, including the unlawful taking of a motor vehicle.

(2) Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or bodily injury of another.

(3) Perjury or the making of a false affidavit or statement under oath to the department under NRS 483.010 to 483.630, inclusive, or under any other law relating to the ownership or driving of motor vehicles.

(4) Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving committed within a period of 12 months.

(5) A second violation within 7 years of NRS 484.379 and the driver is not eligible for a restricted license during any of that period.

(c) For a period of 90 days, if the offense is a first violation within 7 years of NRS 484.379.

2. The department shall revoke the license, permit or privilege of a driver convicted of violating NRS 484.379 who fails to complete the educational course on the use of alcohol and controlled substances within the time ordered by the court and shall add a period of 90 days during which the driver is not eligible for a license, permit or privilege.

3. When the department is notified by a court that a person who has been permitted to enter a program of treatment pursuant to NRS 484.3794 the department shall reduce by half the period during which he is not eligible for a license, permit or privilege to drive, but shall restore that reduction in time if notified that he was not accepted for or failed to complete the treatment.

E.

Statement of Facts

(Blanton)

Defendant, Blanton, was arrested for D.U.I. in North Las Vegas, Nevada, on July 18, 1986, and charged by citation with a violation of N.R.S. 484.379 (D.U.I.). Written demand for jury trial was denied by the North Las Vegas Municipal Court, and an original petition for writ of mandamus was filed in the Eighth Judicial District Court, Clark County, State of Nevada, which later denied the same. Appeal was taken to the Nevada Supreme Court which affirmed the lower court's decision denying the jury trial.

(Fraley)

Defendant, Fraley, was arrested on June 29, 1986, in North Las Vegas, Nevada, and charged with a violation of N.R.S. 484.379 (D.U.I.). Written demand for jury trial was denied by the North Las Vegas

Municipal Court, and Fraley plead guilty. Notice of Appeal to the Eighth Judicial District Court was timely filed for Trial de novo. This latter court granted Defendant's demand for jury trial and remanded; the City of North Las Vegas, Nevada, filed a petition for writ of certiorari with the Supreme Court of Nevada, which Court later, on December 31, 1987, reversed the lower court, thereby denying Fraley's jury trial.

Blanton's Appeal (NSCT No. 17940) and Fraley's Case (NSCT No. 18065) were considered along with 9 other cases upon the same issue by the Nevada Supreme Court.

F.

Stage In State Proceedings That Federal Issue Was First Presented

The federal issues were first formally considered orally and in writing before the Eighth Judicial District Court, Clark County, State of Nevada, and later

before the Supreme Court of the State of Nevada which addressed the federal issues in its Decision.

G.

Contentions Relied On for Allowance of Writ of Certiorari

(1.)

D.U.I. Is A "Serious" Crime Which Should Be Triable By Jury

N.R.S. 484.3792 requires a person convicted of first offense D.U.I. to:

(a) 2 days incarceration or 48 hours (six (6) eight (8) hour days) of community service work; 6 months maximum incarceration is allowed by statute

(b) a mandatory minimum $200 fine, and up to $1,000 maximum

(c) mandatory court counseling which costs the Defendant about $150, and

(d) NRS 484.384 requires a mandatory driver's license revocation for 90 days upon DUI conviction by the State of Nevada Department of Motor Vehicles.

(e) As a practical matter, automobile insurance premiums skyrocket for a person convicted of D.U.I.

(f) Upon a second conviction for misdemeanor D.U.I. within a 7-year period, a mandatory 10 days incarceration and a mandatory minimum fine of $500.

(g) A third arrest for D.U.I. within 7 years is a felony carrying, upon conviction, a mandatory minimum prison term of 1 year (up to 6 years) and a fine of not less than $2000 up to $5000.

The direct and collateral consequences of conviction for D.U.I. require the option of a jury trial to a Defendant so charged. Duncan v. Louisiana, 391 U.S. 145 (1968). It is equally clear that our society considers a charge of D.U.I. to be a "serious" crime, thereby mandating the option of a jury trial. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion); District of Columbia

v. Clawans, 300 U.S. 617, 628 (1937).

(2.)

The Standard for A Jury Trial Set Out In Duncan v. Louisiana Has Been Met

Duncan v. Louisiana, supra, indicates that a national standard is the test for jury trial. See Appendix, Tab "B", for a listing of States which allow D.U.I. jury trials. The State of Nevada is a part of a minority of States which deny a jury trial in a D.U.I. prosecution.

(3.)

Unequal Application of the Law Is Resulting Because of This Unresolved Issue

The Supreme Court of Nevada has ruled that a jury trial is not allowed in D.U.I. prosecutions by either the State of Federal Constitutions in State or City courts in the State of Nevada.

The federal district court for the District of Nevada has recently ruled that a jury trial is allowed in the State of Nevada pursuant to federal law. See

Appendix, Tab "C", Decision in Bronson v. Swinney, 648 F.Supp. 1094 (D. Nev. 1986), now on Appeal to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit Court of Appeals itself has ruled that D.U.I. is a "serious" charge carrying a right to jury trial. United States v. Craner, 652 F.2d 23 (CA9 1981); United States v. Best, 573 F.2d 1095, 1099 (CA9 1978). Compare, District of Columbia v. Colts, 282 U.S. 63 (1930) where this Court held that reckless driving was both indictable at common law and Malem in se, and thereby "serious".

The way things stand now in Nevada is that a Defendant cannot obtain a jury trial in a State or city court, but can obtain a jury trial in federal court for D.U.I. if he happens to be arrested on federal land. But more importantly, a Defendant who is convicted of D.U.I. in State court can simply file a petition for writ of habeas

corpus pursuant to 28 U.S.C. §2254 in federal court where, as a matter of federal law, the State conviction is vacated and remanded to the State or city court for Trial before a jury. Defendants who cannot afford legal fees for a federal petition for writ of habeas corpus are denied a jury trial, while more affluent Defendants can have their convictions vacated.

Not only is the State of Nevada seemingly in conflict with most States (which allow jury trials in D.U.I. cases), but is in conflict with the Ninth Circuit Court of Appeals as to the allowance of a jury trial in D.U.I. cases pursuant to federal law. It has been held that a direct conflict between a decision of a Court of Appeals and that of the highest court of a State where that conflict concerns a federal question, is an established reason for a grant of certiorari. Anderson v. Maryland, 427 U.S.

463 n.5 (1976); Lakeside v. Oregon, 435 U.S. 333, 336 & N.3 (1978); Baldwin v. Alabama, 472 U.S. 372 (1985).

Likewise, the Supreme Court of the State of Nevada's decision in the within cases is at a precise loggerhead with the decision of the federal court of the District of Nevada in Bronson v. Swinney, supra. Such a conflict is also a recognized reason for a grant of certiorari. Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (this Court noted probable jurisdiction of an appeal from the highest state court to resolve a conflict between that court and a federal 3-judge court, both having ruled on the constitutionality of the same state statute); see also Ward v. Illinois, 431 U.S. 767, 770-71 (1977).

Certiorari should be granted in these cases to resolve this intolerable federal-state conflict over jury trials in Nevada

state D.U.I. cases.

IV.

CONCLUSION

For the above-cited reasons, this Court should grant certiorari in these cases to consider the issue on the merits.

DATED this 24th day of February, 1988.

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Counsel for FRALEY

Attorneys for Defendants/Petitioners

...

...

CERTIFICATE OF SERVICE BY MAIL

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners,	)	
vs.	)	NSCT. NO. 17940 (Blanton)
CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	NSCT. NO. 18065 (Fraley)

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

The undersigned hereby certifies and affirms that I am an Employee of the law office of JOHN J. GRAVES, JR., ESQ., attorney for Petitioner in the above-entitled matter, and a person of such age and discretion as to be competent to serve papers.

That on February 24th, 1988, I served a copy of the foregoing and attached PETITION FOR WRIT OF CERTIORARI by depositing same in an enclosed in an

envelope, first-class postage fully prepaid in the United States Mails, addressed as follows:

City of North Las Vegas
City Attorney's Office
Criminal Division
1301 East Lake Mead
North Las Vegas, Nevada 89030

ATTORNEY GENERAL'S OFFICE
300 South Fourth #1100
Las Vegas, Nevada 89158

STATE OF NEVADA ATTORNEY GENERAL'S OFFICE
Heroes Memorial Building
Carson City, Nevada 89710

Theresa J. Cole, An Employee of
JOHN J. GRAVES, JR., ESQ.

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...

CERTIFICATE OF MAILING BY COUNSEL FOR PETITIONER

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners,	)	
vs.	)	NSCT. NO. 17940 (Blanton)
CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	NSCT. NO. 18065 (Fraley)

Pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, Counsel for Petitioner herein, a member of the Bar of this Court, Certifies that to his knowledge the Petition for Writ of Certiorari was mailed to this Court on the 24th day of February, 1988, within the permitted time to file said Petition, and that copies of the same were, on that date mailed to the North Las Vegas City Attorney's Office, Attorney General's Office, Las Vegas, Nevada,and State of Nevada Attorney General's Office, Carson,

City, Nevada.

DATED this 24th day of February, 1988.

John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.

SUBSCRIBED AND SWORN to before me

this 24th day of February, 1988.

Theresa J Cole
NOTARY PUBLIC in and for
Clark County, State of Nevada.

THERESA J. COLE
OFFICIAL SEAL
NOTARY PUBLIC-NEVADA
CLARK COUNTY
My Appointment Expires Aug. 1, 1990

87-1437

No. _____

_____

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	NSCT. NO. 17940 (Blanton) NSCT. NO. 18065 (Fraley)

On Writ of Certiorari To The Supreme Court of The State of Nevada

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Counsel for Respondent

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United States District Court, District of Nevada Memorandum Decision and Order, Entered 10/01/86 Bronson v. Swinney	"B"
Listing of States and D.U.I. laws therein	"C"

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA, AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents.	)	No. 17940 FILED DEC 31 1987 /s/ Jeanne C. Richards JUDITH FOUNTAIN CLERK, SUPREME COURT
JEANETTE HILTON, Appellant, vs. THE CITY OF LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, Respondent.	)	No. 17976
SAMUEL RAY FLANAGAN, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17997

PATRICIA ANN COLLIE, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17998
VINCENT H. WOODS, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17999
JAMES ARCADE, Appellant, vs. THE HONORABLE STEPHEN C. WEBSTER, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 18000

CITY OF LAS VEGAS, NEVADA, AND A. LORING PRIMEAUX, JUDGE OF THE LAS VEGAS MUNICIPAL COURT, Appellants, vs. JOSEPH M. FREELY, Respondent.	No. 18032
CITY OF NORTH LAS VEGAS, NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ADDELIAR D. GUY, DISTRICT JUDGE, Respondents. MARK D. FRALEY Real Party In Interest.	No. 18065

CITY OF LAS VEGAS, NEVADA, AND STEPHEN WEBSTER, JUDGE OF THE MUNICIPAL COURT, Appellants, vs. JAMES P. CUNNINGHAM, SR., Respondent.	No. 18073
ANTHONY L. WILEY, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN L. HUFFAKER, DISTRICT JUDGE, Respondents. CITY OF LAS VEGAS, LAS VEGAS MUNICIPAL COURT OF THE CITY OF LAS VEGAS, THE HONORABLE A. LORING PRIMEAUX, JUDGE, Real Party In Interest.	No. 18092

TIMOTHY JOHN CAHALIN, Appellant, vs. THE HONORABLE STEPHEN WEBSTER, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 18140

Appeals from orders denying petitions for writs of mandamus, Eighth Judicial District Court, Clark County; Hon. Michael J. Wendell, District Judge (17940); Hon. Donald M. Mosley, District Judge (17976); Hon. John F. Mendoza, District Judge (17997, 17998, 18000); Hon. Carl J. Christensen, District Judge (17999); Hon. Earle W. White, Jr., District Judge (18140).

Appeals from orders granting petitions for writs of mandamus, Eighth Judicial District Court, Clark County; Hon. Addeliar D. Guy, District Judge (18032);

Hon. Joseph S. Pavlikowski, District Judge (18073).

Original petitions for writ of certiorari (18065), and writ of prohibition (18092).

Affirm Docket Nos. 17940, 17976, 17997, 17998, 17999, 18000 and 18140; reverse and remand to the Eighth Judicial District Court Docket Nos. 18032 and 18073; grant petition No. 18065; deny petition No. 18092.

Graves, Leavitt & Koch, and John G. Watkins, Las Vegas,
for Appellant Melvin R. Blanton.

Morgan D. Harris, Public Defender, Craig B. Davis, Deputy Public Defender, Clark County,
for Appellants Jeanette Hilton, Samuel Ray Flanagan, Patricia Ann Collie, Vincent H. Woods, James Arcade and Timothy John Cahalin, and Petitioner Anthony L. Wiley.

George F. Ogilvie, City Attorney, and Nancy A. Becker, Deputy City Attorney, Las Vegas,
for Appellants City of Las Vegas, Hon. Stephen C. Webster and Hon. A. Loring Primeaux.

Roy A. Woofter, City Attorney, and Mark L. Zalaoras, Deputy City Attorney, North Las Vegas,
for Petitioner City of North Las Vegas.

George F. Ogilvie, City Attorney, Nancy A. Becker, Deputy City Attorney, and Lawrence M. Moore, Deputy City Attorney, Las Vegas,
for Respondents City of Las Vegas, Hon. Stephen C. Webster and Hon. A. Loring Primeaux.

Roy A. Woofter, City Attorney, and Mark Zalaoras, Deputy City Attorney, North Las Vegas,
for Respondents City of North Las Vegas and Hon. Gary J. Davis.

Morgan D. Harris, Public Defender, and Craig B. Davis, Deputy Public Defender, Clark County,
for Respondents Joseph M. Feely and James P. Cunningham, Sr.

John G. Watkins, Las Vegas,
for Real Party in Interest Mark D. Fraley.

Hon. Brian McKay, Attorney General, and James L. Rankl, Deputy Attorney General, Carson City,
for the State of Nevada, Amicus Curiae.

O P I N I O N

By the Court, GUNDERSON, C.J.:

This court consolidated the instant appeals and petitions to consider two questions. First, is NRS 266.550, which precludes jury trials in municipal courts, constitutional? [1] Second, does either the United States Constitution or the Nevada State Constitution mandate that persons charged in the municipal courts with driving under the influence of alcohol, a misdemeanor, receive jury trials?

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[1] NRS 266.550 states:

> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justices' courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature; but the trial and proceedings in such cases shall be summary and without a jury.

Appellants Melvin R. Blanton, Jeanette Hilton, Samuel Ray Flanagan, Patricia Ann Collie, Vincent H. Woods, James Arcade and Timothy John Cahalin were charged in the municipal court with driving under the influence of alcohol (DUI), a misdemeanor. [2] See NRS 484.379 and 484.3792(1)(a) and (b). Each of these individuals filed a pretrial petition for a writ of mandamus in the Eighth Judicial District Court challenging the denial by the municipal court of his or her individual demand for a jury trial. The district court denied each petition, and these appeals followed.

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[2] The amended complaint filed in the municipal court against appellant Woods charges Woods with driving under the influence of both alcohol and a controlled substance.

Respondents Joseph M. Feely and James P. Cunningham, Sr., were also charged in the municipal court with misdemeanor DUI. Each of these individuals successfully prosecuted a pretrial petition for a writ of mandamus challenging the denial by the municipal court of his demand for a jury trial. The district court declared NRS 266.550 unconstitutional in those cases, and directed that jury trials be set for Cunningham and Feely. The City of Las Vegas appeals from those orders.

Real party in interest Mark D. Fraley was convicted in the municipal court of misdemeanor DUI. Fraley appealed the conviction to the Eighth Judicial District Court; that court declared NRS 266.550 unconstitutional and remanded the case for a jury trial. The City of North Las Vegas subsequently filed in this court an original petition for a writ of certiorari challenging the district court's decision.

Petitioner Anthony L. Wiley was charged in the municipal court with misdemeanor DUI. Wiley filed in the Eighth Judicial District Court a petition for a writ of habeas corpus, challenging the denial by the municipal court of his demand for a jury trial. The district court denied relief on procedural grounds and Wiley's original petition in this court for a writ of prohibition followed.

Statutory Grounds for Right to Jury Trial

NRS 266.550 provides municipal courts with the power and jurisdiction of justices' courts, except that the statute precludes municipal courts from conducting jury trials. Until 1985, each of the thirteen incorporated municipalities of this state had a provision in its charter

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applying NRS chapter 266 to its municipal courts. [3] In 1985, as part of a legislative removal of certain duplicative statutes, the legislature repealed those provisions from the charters of the thirteen cities. [4] The application of NRS chapter 266 to the municipal courts of these cities is now governed by NRS 266.005, which states:

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[3] See, e.g., North las Vegas City Charter, § 4.010 at 533 (1979) ("There shall be a municipal court of the city to which the provisions of chapter . . . 266 of NRS, relating to municipal courts, as amended from time to time, shall apply").

[4] 1985 Nev. Stats. ch. 208, §§ 12, 14, 16, and 19(2)-(12), at 674-677. NRS chapter 5, which applies to all municipal courts in the state, does not contain a provision analogous to NRS 266.550.

> The provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter enacted or granted pursuant to the provisions of section 1 of article VIII of the constitution of the State of Nevada.

Las Vegas and North Las Vegas, whose municipal courts are the subject of the instant dispute, are incorporated cities existing under the provisions of special legislative acts. See 1983 Nev. Stat. Ch. 517 at 1391-1437; 1971 Nev. Stat. Ch. 573 at 1210-1229. Consequently, the statutory prohibition against the holding of jury trials in the municipal courts, see NRS 266.550, does not apply to the cases

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presently before this court.[5] We therefore need not reach the question in the instant cases of whether NRS 266.550 is constitutional. Accordingly, we turn to the Nevada State and United States Constitutions to determine whether individuals charged with misdemeanor DUI offenses in the Municipal courts of this state have a constitutional right to a jury trial.

Constitutional Grounds for Trial by Jury

The various appellants, respondents and petitioners claim that their right to

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[5] The other cities with special charters are Boulder City, Caliente, Carlin, Carson City, Elko, Gabbs, Henderson, Reno, Sparks, Wells and Yerington.

Only four cities incorporated under chapter 266 of the NRS (Ely, Fallon, Lovelock and Winnemucca) are still statutorily authorized to deny requests for jury trials pursuant to NRS 266.550.

jury trials in the municipal courts is guaranteed by the United States and Nevada State Constitutions. Article I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution, guarantee individuals a right to a jury trial.[6] Nevada's constitutional provision has been construed as confirming and securing the right to a jury trial as it was understood at common law. State v. Ruhe, 24 Nev. 251, 262, 52 P. 274, 277 (1898). Thus, the right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution.

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[6] U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Nev. Const. art. I, § 3: "The right of trial by Jury shall be secured to all and remain inviolate forever . . . ."

It is well settled that the sixth amendment right of trial by jury does not extend to every criminal proceeding. District of Columbia v. Clawans, 300 U.S. 617, 624 (1937). Almost one hundred years ago, the United States Supreme Court stated that a jury trial is not required "in that class or grade of offences called petty offences, which, according to the common law, may be proceeding against summarily in any tribunal legally constituted for that purpose . . . ." Callen v. Wilson, 127 U.S. 540, 557 (1888). Since the decision in Callen, the Supreme Court has grappled with the problem of drawing a line between those criminal cases requiring a jury trial, and those not included in the protections of the sixth amendment. For example, in District of Columbia v. Colts, 282 U.S. 63 (1930), the Court considered the offense of reckless driving at an excessive speed, for which the maximum

punishment for a first offender was a $100 fine and 30 days in jail. Although the penalty was not severe, the Court thought the offense too serious to be regarded as "petty." Id. at 73. Later, in District of Columbia v. Clawans, 300 U.S. 617 (1937), the court concluded that the offense of peddling without a license, which carried a maximum penalty of a $300 fine or 90 days in jail, was a "petty" offense. In reaching that conclusion the Court noted that the offense was not a crime at common law, and that the offense was "relatively inoffensive." Id. at 625. The Court added, however, "the severity of the penalty [is] an element to be considered." Id. The Court concluded that 90 days was not so severe a maximum penalty as to take the offense out of the category of "petty". Id. at 627.

In more recent cases, the Supreme Court has sought a more definite and

workable standard by which to decide the question of the scope of the right to trial by jury. Consequently, the Supreme Court has increasingly relied on the severity of the maximum possible sentence rather than relying on other criteria. The search for an objective criterion can be found in Cheff v. Schnackenberg, 384 U.S. 373 (1966), where the court concluded that crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. The evolution continued in Duncan v. Louisiana, 391 U.S. 145 (1968), where the Supreme Court more clearly emphasized the maximum authorized penalty over other criteria in determining whether the crime is so serious as to require a jury trial. Id. at 159. In Duncan, the Supreme Court stated that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not

and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." Id. The Court stated that although "it is necessary to draw a line . . . separating petty from serious infractions," id. at 160-61, under the facts of the case, it was "sufficient . . . to hold that a crime punishable by two years in prison is . . . not a petty offense." Id. at 161-62. In Frank v. United States, 395 U.S. 147 (1969), the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. The Supreme Court concluded that, of the indicators capable of objective assessment, the most important is the severity of the possible sentence.

Finally, in Baldwin v. New York, 399 U.S. 66 (1970), the Supreme Court

established the maximum penalty as the only objective criterion. Relying on Frank, Duncan and Clawans, the Court examined the existing laws and practice throughout the nation and concluded:

> This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn--on the basis of the possible penalty alone--between offenses that are and that are not regarded as "serious" for purposes of trial by jury.

399 U.S. at 72-73 (footnote omitted) (emphasis added). The court went on to draw a line between serious and petty offenses:

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that fact him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter

> and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous through they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.

Id. at 73. It thus appears that the Supreme Court has retreated from the position enunciated in District of Columbia v. Colts, supra, that the nature of the offense is of primary importance, and has instead adopted a more workable objective test based on the severity of the maximum possible penalty alone.

In State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983), this court relied solely upon the objective criterion of the maximum possible penalty in its characterization of driving under the influence of alcohol as a petty offense. Respondent Smith was charged with DUI in the justice's court.

The justice's court denied Smith's demand for a trial by jury, and Smith sought a writ of mandamus in the district court. The district court granted extraordinary relief, and ordered the justice's court to grant Smith a jury trial. This court reversed, and concluded that a jury trial is not constitutionally mandated:

> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury.

99 Nev. at 810, 672 P.2d at 634.

At the time of the alleged offense in Smith, the maximum punishment for a first-time DUI conviction in Nevada was six months imprisonment or a fine of up to $1,000.00. Id. See 1983 Nev. Stats. ch.

426, §§ 8, 9 and 10, at 1068 1071. In 1983, the legislature increased the minimum penalties for misdemeanor DUI offenses. For example, the legislature increased the minimum fine for a first offense from $100 to $200 and mandated a minimum mandatory jail sentence of two days.[7] The maximum penalties, however, remain unchanged.

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[7] Specifically, the legislature increased the period within which a prior offense could be used to enhance a subsequent offense from five years to seven years. The minimum fine for the first offense increased from $100 to $200, in addition to the tuition fee for an alcohol education course the defendant must pay. The maximum fine remains $1000. The legislature imposed a minimum, mandatory term of imprisonment of not less than 2 days or the performance of 48 hours of community service while dressed in distinctive garb. 1983 Nev. Stats. ch. 426, § 10 at 1070. Additionally, suspension of the first offender's driver's license is no longer within the sentencing court's discretion. NRS 483.460(1)(c) now provides for mandatory revocation of the offender's driver's license by the Department of Motor Vehicles for a period of ninety days. See 1983 Nev. Stats. ch. 426, § 22 at 1081. After forty-five days a restricted license may be available. NRS 483.490(2). (Continued ...)

Although this court held in Smith that defendants charged in Nevada with misdemeanor DUI offenses have no right to a jury trial, a recent decision of the federal district court for the district of Nevada reached the opposite conclusion. See Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986). In Bronson, the defendant was convicted of first offense DUI following a bench trial in the justice's

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[7] (... continued)

Although the 1983 legislature did not increase the second-offender's jail time or fine ("not less than 10 days nor more than 6 months in jail . . . not less than $500 nor more than $1,000, "see NRS 484.3792(1)(b)), it increased the period of the second offender's driver's license revocation from six months to one year. 1983 Nev. Stats. ch. 426 §§ 22-23 at 1081-82. See NRS 483.490(2); 483.460(1)(b)(5) (no restricted license is available).

Neither offense is subject to plea bargaining or probation. NRS 484.3792(3). First and second offenders who elect to undergo at least one year of drug or alcohol counseling may receive reduced sentences. See NRS 484.3794.

Since 1983, these statutory provisions have not been amended in any material respect.

court. After pursuing his appeal to the state district court, the defendant petitioned the federal district court for a writ of habeas corpus, asserting that he had been denied his constitutional right to a jury trial. The federal district court examined the 1983 amendments to Nevada's DUI statutes and enumerated the many collateral consequences that convictions for DUI entail, such as mandatory revocation of the driving privilege, increased penalties for subsequent offenses, and the publication in local newspapers of the names of those offenders. Although the federal district court acknowledged that "[t]he most important criterion in determining the seriousness with which society regards an offense is the maximum authorized penalty," 648 F.Supp. at 1097, the district court looked primarily to decisions of two three-judge panels of the Ninth Circuit Court of

Appeals, one a split decision, which held that factors other than the maximum authorized penalty are relevant in determining whether an offense is serious or petty. Specifically, the court relied on United States v. Craner, 652 F.2d 23 (9th Cir. 1981), in which a three-judge panel examined the collateral consequences of a federal DUI conviction in concluding that DUI is a serious offense. The court also relied on United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976), in which a panel, in a split decision, concluded that misdemeanor conspiracy is a serious offense, reasoning that the crime was indictable at common law, was itself morally offensive, and was malum in se.[8]

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[8] In contrast, the dissent in Sanchez-Meza, citing Baldwin v. New York, 399 U.S. 66 (1970), noted that the "Supreme Court recently has been focusing on the length of the potential sentence to

(Continued ...)

The federal district court then concluded that "the nature of the offense, the collateral consequences of a conviction . . and the fact that the penalty . . . includes mandatory imprisonment are factors that reflect the seriousness with which society regards the offense of driving while intoxicated." 648 F. Supp. at 1098. Applying this analysis, the federal district court reasoned:

> In view of the automatic license revocation and mandatory jail sentence that accompany a conviction for driving while intoxicated,

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[8] (...continued)
determine whether an offense is petty." 547 F.2d at 465. Consequently, the dissent concluded that because the defendant was subject to a maximum penalty of only six months imprisonment, under the "most relevant" criterion announced by the Supreme Court, the offense, as a misdemeanor, was petty with no entitlement to a jury. Id.

> in view of the system of increasing minimum punishments for subsequent offenses, and in view of the opprobrious nature of the offense, it is apparent that driving while intoxicated is an offense regarded as serious by the people of the State of Nevada. It is an offense serious enough to require a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

648 F.Supp. at 1100. The federal court distinguished our holding in Smith, noting that in Smith this court considered the DUI penalties in effect in Nevada prior to the legislature's 1983 amendments. Id. Further, the federal court criticized the analysis in Smith as "too restricted," because in determining whether or not the offense was serious, this court "looked only to the maximum imprisonment authorized." Id. The federal district court concluded that "[t]he people of the State of Nevada, through their legislature

and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime." Id.

In the present case, the proponents of the position that DUI is a "serious" offense requiring a jury trial argue that this court should adopt the reasoning in Bronson and overturn Smith. We disagree.

We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971). Even an en banc decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. Nev. Const. art. I, § 2. See Bargas v. Warden,

87 Nev. 30, 482 P.2d 317, cert. denied, 403 U.S. 935 (1971). Further, we have respectfully concluded that Bronson, and the decisions of the 9th Circuit panels upon which the federal district court relied, represent an unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin.

As demonstrated above, the collateral consequences of a conviction have not been a criterion relied upon in the recent decisions of the United States Supreme Court. See Baldwin v. New York, 399 U.S. 66 (1970); Frank v. United States, 395 U.S. 147 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); see also Taylor v. Hayes, 418 U.S. 488 (1974); Codispoti v. Pennsylvania, 418 U.S. 506 (1974). Moreover, the Court's references to "line drawing" in Duncan and Baldwin, and its increasing reliance upon the maximum punishment as the sole criterion for characterizing offenses as

"serious" or "petty," suggest that only the maximum punishment for an offense need be examined to determine whether a jury trial is constitutionally mandated. Further, in Baldwin, the Supreme COurt specifically drew a line of demarcation between "serious" and "petty" offenses; if the maximum authorized punishment is less than six months the offense is "petty." 399 U.S. at 73. The maximum term of imprisonment possible in Nevada for a misdemeanor DUI offense remains six months. The maximum possible fine remains $1,000. Although the minimum penalties have been increased, the maximum penalties remain the same. We conclude, therefore, that the federal constitution does not require us to overturn our holding in Smith that, under the statutory penalties for DUI in Nevada, the United States Constitution does not guarantee the right to jury trials in misdemeanor DUI cases.

Several serious policy considerations reinforce our conclusion that we should not abandon our holding in Smith. First, a non-jury trial in a misdemeanor case is speedy and inexpensive. On the other hand, a decision of this court requiring jury trials in the prosecution of DUI offenses in the municipal court would result in tremendous expense to the municipalities of this state. For example, courtrooms would require renovation, and in some cases expansion or replacement, in order to accommodate jurors. The increased time required to conduct jury trials would in many instances occasion a need for municipalities to employ more judges and more personnel, and to build still further courtrooms. These expenses would be exacerbated because, in DUI cases, the prosecutor is prohibited by statute from engaging in plea bargaining. See NRS 484.3792(3). The resulting expense to the

municipalities may actually deter the prosecution of DUI offenses. Thus, requiring jury trials in municipal courts for DJI cases could mandate a lack of action against those who drink and drive. "As a practical matter, the lower courts are not going to try [DUI] cases if a jail sentence is involved. It is difficult to justify a $500 to $1000 jury so that a defendant can spend [two days] in jail. Economics will prevail over justice." Brenner v. City of Casper, 723 P.2d 558, 563-64 (Wyo. 1986) (Brown, J., dissenting).

In addition to the expense imposed upon the municipalities, a jury trial is not a cost-free transaction to the jurors, their families and their employers, particularly in municipalities where jurors may be called into service for as long as a year at a time. These burdens will weigh heaviest upon the residents of the more rural areas, who may be forced to travel

excessive distances for service and who may be forced to serve with disproportionate frequency due to the relatively few prospective jurors in these areas.

Nor are we persuaded that the current wave of public concern over the problem of intoxicated drivers somehow converts misdemeanor DUI into a "serious" offense under the federal constitution. While this court does not condone the commission of any crime, the offense of DUI is no more opprobrious than other crimes over which the municipal court has jurisdiction, such as indecent conduct or lewd behavior. See NRS 266.555(2). A decision giving individuals charged with DUI in the municipal courts the right to a jury trial could arguably then be extended to any offense currently the subject of a ground swell of public opinion.

Moreover, a decision of this court mandating jury trials in DUI cases would

create numerous unresolved administrative problems. Procedures for the summons and selection of jurors in the municipal courts do not exist. A decision requiring jury trials in the municipal courts could not be implemented until such procedures were developed. This court is not in a position to legislate the procedures to be followed in such cases. Further, the legislature of this state, which meets once every two years, is not presently in session to fill the void. Also unresolved would be the issues of whether the proposed jury could be comprised of fewer than twelve jurors, and whether the verdict must be unanimous. See Parkham v. Municipal Court, City of Sioux Falls, 199 N.W. 2d 501, 508 (S.D. 1972) (Bielgelmeier, J., dissenting, citing "The Six-Man Jury," 17 S.D. Law Rev. 285). Presently, juries in criminal trials held in the district courts of the State of Nevada are comprised of twelve jurors, who

must reach a unanimous verdict. If this court were to legislate a lower standard for municipal courts, we are not convinced that a jury, comprised of a minimum number of members or required to reach less than a unanimous verdict, would necessarily render a decision more reliable than that of a judge. If some higher standard is required, then this court would be fixing greater protections for violators of city ordinances than the United States Supreme Court requires states to provide in felony prosecutions.

Finally, we note that in Nevada's outlying communities, due to the demographic and economic realities of our rural areas, municipal courts have for the most part been staffed by non-lawyer judges. Some of these judicial posts are part-time positions. Attorneys are scarce, and, historically, the few present have chosen to pursue other endeavors--with the

result that the lower judicial posts have developed upon intelligent and popular laypersons.

In our view, as it has developed, Nevada's court system has been successful. Our legislature has provided adequate funding for judicial education, and has mandated that all non-lawyer judges must attend The National Judicial College, located in Reno. See NRS 5.025; 5.026. In addition, at least twice yearly, our court conducts seminars on continuing legal education for such judges. We also send a number of them out-of-state each year, for seminars of the American Academy of Judicial Education and the American Judges Association, and for other programs focused on the needs of non-lawyer judges. As a result, over time, Nevada has developed a cadre of lay municipal court judges who, in this court's opinion, are conscientious, well trained in the substantive law of the

misdemeanor offenses that are within their jurisdiction, and competent to conduct non-jury trials relating to such offenses--including DUI matters. In short, we believe Nevada's system works, and works well.

Knowing our judges, however, we would be concerned about imposing upon all of our lay municipal court judges such novel and additional burdens as supervising voir dire examinations of jurors, ruling upon challenges for cause, safeguarding jurors against undue publicity,and formulating written jury instructions to govern the various offenses within their jurisdiction. The matter of jury instructions is particularly troubling. We think we can train, and have trained, our lay municipal court judges to understand the legal precepts necessary to manage the bench trials they conduct in DUI cases and other misdemeanor matters fairly. However, as

highly as Nevada's lay judges are regarded by this court and by the communities they serve, we fear that the formulation of written jury instructions might require additional linguistic and legal skills, beyond the background of some very effective judges now serving in our smaller municipal courts. And, if imposing jury trials upon such courts ultimately necessitated a change to a system of all law-school-trained judges, we are not at all persuaded that the quality of justice in those courts would improve. Rather, the result might well be that some very competent lay judges, well respected and accepted by their constituents, would be replaced by persons who, though possessing law degrees and licenses, would not merely be strangers to the communities they would come to serve. They also might be something less than the better product of American law schools, and less than the

persons they arrived in town to replace.

These significant issues relating to serious financial, administrative, and policy concerns should be resolved by the legislature, after it has conducted appropriate hearings and investigations regarding the implications of the various alternatives. "Judicial restraint is a worthwhile practice when the proposed new doctrine may have implications far beyond the perception of the court asked to declare it." Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 101, 450 P.2d 358, 359 (1969). The position of the federal district court in Bronson, were it to be adopted by this court today, would have just such far reaching implications. Our extension of jury requirements to cases arising in the municipal court, when the current decisions of the United States Supreme Court are contrary, would in our view impose upon the domain of the

legislature. Moreover, if such a drastic change in the interpretation of the federal constitution is to be judicially mandated, such a decision must come from the United States Supreme Court. While we have great respect for the federal court that rendered the decision in Bronson, we are unwilling to impose upon the municipalities of this state the burden of conducting jury trials based solely upon that court's interpretation of the federal constitution, which we believe is at odds with the current decisions of the United States Supreme Court.

Other jurisdictions have similarly concluded that the federal constitution does not guarantee DUI defendants a right to jury trials in misdemeanor cases. Justiniano Matos v. Gasper Rodriguez, 440 F. Supp. 673, 677 (D.P.R. 1976) ("the doctrine of District of Columbia v. Colts, supra, wherein primary importance was given

to the nature of the offense, is no longer applicable"); Hilliard v. City of Gainesville, 213 So.2d 689, 691 (Fla. 1968) ("the maximum penalty which can be prescribed by [the] Florida municipal [DUI] ordinance is well below the "petty offense" maximum [of six months imprisonment] indicated by Cheff v. Schnackenberg, supra"); (State v. Young, 234 N.W.2d 196, 197 (Neb. 1975) (where the maximum penalty for second offense DUI is three months, there is no entitlement to a jury trial under the United States Constitution); Brenner v. City of Casper, 723 P.2d 558, 561 (Wyo. 1986) ("[w]hile recognizing the standard utilized by the United States Supreme Court, it is our conclusion that greater protection is afforded by the Wyoming Constitution"). Those states providing jury trials in misdemeanor DUI cases do so pursuant to express statutory provisions or their own state

constitutions.[9] Only one state arguably has interpreted the federal constitution to require a jury trial in DUI cases where the maximum penalty does not exceed six months imprisonment. See State v. O'Brien, 704 P.2d 883 (Haw. 1985). As noted above, we believe the Supreme Court decisions interpreting the sixth amendment do not require such a conclusion.

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See, e.g., Rothweiler v. Superior Court of Pima County, 410 P.2d 479 (Ariz. 1966) (charge of DUI deemed a "criminal prosecution" and therefore a right to jury trial exists under Arizona Constitution); Fisher v. State, 504 A.2d 626 (Md. 1986) (criminal defendant charged with offense for which the maximum penalty exceeds ninety days is entitled to a jury trial under Maryland Constitution); Brown v. Multnomah County Dist. Court, 570 P.2d 52 (Ore. 1977) (charge of DUI deemed a "criminal prosecution" for purposes of determining right to a jury trial under Oregon Constitution which guarantees jury trials in all "criminal prosecutions"); Brenner v. City of Casper, 723 P.2d 558 (Wyo. 1986) (crime punishable by jail term, regardless of length, was serious crime for which a jury trial is required under Wyoming Constitution).

In conclusion, absent an express pronouncement by the Supreme Court of the United States, judicial restraint dictates that this court, in resolving the constitutional question before us, decline to take guidance from the supreme courts of other states interpreting their own state statutes and state constitutions, or from the lower federal courts who have, in our view, extended the current decisions of the United States Supreme Court. Especially in view of the substantial ramifications such a holding would entail, we consider it inappropriate to look beyond the parameters currently defined by the United States Supreme Court and require jury trials in misdemeanor DUI cases.

We therefore affirm the district court orders denying the petitions for writs of mandamus in Docket Numbers 17940, 17976, 17997, 17998, 17999, 18000 and 18140. We reverse the district court

orders granting petitions for writs of mandamus in Docket Numbers 18032 and 18073, and remand these matters for further proceedings consistent with this opinion. We grant the original petition for a writ of certiorari in Docket Number 18065,and instruct the clerk of this court to issue a writ of certiorari, forthwith, compelling the district court to vacate its order reversing Fraley's conviction and to enter a new order consistent with this decision. We deny the original petition for writ of prohibition in Docket Number 18092.

_____, C. J.
Gunderson

We concur:

_____, J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Mowbray

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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRENT R. BRONSON,

Petitioner, CV-R-86-130-ECR

v. MEMORANDUM DECISION AND ORDER

VINCENT SWINNEY, et al.,

Respondents.

Brent R. Bronson petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts that he was denied his constitutional right to a jury trial.

On December 29, 1984, petitioner was stopped on Interstate Route 80 by a Nevada Highway Patrol officer for speeding and weaving. Petitioner failed a field

sobriety test and was transported to the county jail for a chemical test, which he refused.

Petitioner was charged with three misdemeanors: driving while intoxicated, failure to drive within one traffic lane, and unnecessary waste of a resource currently in short supply. Under Nevada law a first offense of driving while intoxicated is punishable by payment of tuition for and attendance of an educational course on the abuse of alcohol and controlled substances, imprisonment for not less than two days nor more than six months in jail (or performance of forty-eight hours of work for the community while dressed in distinctive garb), and a fine of not less than $200 nor more than $1,000.[1] NRS § 484.3792. In addition, there are collateral consequences of a conviction for driving while intoxicated that will be discussed below. Failure to drive within

one traffic lane is punishable under Nevada law by imprisonment in the county jail for not more than six months, or a fine of not more than $1,000, or both. NRS §§ 484.305, 484.251, 193.150. The offense of wasting a resource in short supply, committed by driving between the speeds of fifty-five and seventy miles per hour, is punishable under Nevada law by a fine of $5. NRS § 484.362.

The criminal complaint was filed in Reno Justice Court. Petitioner filed a demand for a jury trial, which was denied.

A bench trial ensued. Petitioner was convicted on all three counts; he was sentenced to four days in jail, fined $430, ordered to pay a $30 administrative assessment, and ordered to attend an educational course on the abuse of alcohol and controlled substances. On appeal the district court affirmed the convictions, but held that petitioner could not receive

separate sentences for driving while intoxicated and for failing to drive within one traffic lane since those offenses arose from identical circumstances and merged for purposes of sentencing. The court remanded for resentencing with the requirement that the sentence not exceed the maximum penalty for commission of a single misdemeanor. Upon remand, the justice court sentenced petitioner to four days imprisonment in the county jail and imposed a fine of $460. Petitioner appealed to the Nevada Supreme Court, but that court dismissed for lack of jurisdiction.

While in custody, petitioner applied for habeas corpus relief contending that the Nevada court's refusal to allow him a jury trial violated his constitutional rights.

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury ..." The United States Supreme Court, in Duncan v. Louisiana, 391 U.S. 145 (1968), held that the right to trial by jury guaranteed by the Sixth Amendment is a fundamental right and is one guaranteed as against the states by the Fourteenth Amendment.

Explaining why the right to trial by jury is fundamental, Justice White wrote:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an

> accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan, 391 U.S. at 155-156.

Despite the broad language of the Constitution, and despite the importance of the right to trial by jury, courts have consistently held that the Sixth Amendment guarantees a jury trial only to defendants charged with "serious" offenses; defendants charged with "petty" offenses are not constitutionally entitled to a jury trial. Duncan, 391 U.S. at 159.

The determination whether an offense is petty or serious is made on the basis of objective criteria reflecting the seriousness with which society regards the offense. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).

The most important criterion in determining the seriousness with which society regards an offense is the maximum authorized penalty (i.e., the maximum imprisonment and fine authorized as punishment for the offense). Baldwin v. New York, 399 U.S. 66, 68 (1970); Frank v. United States, 395 U.S. 147, 148 (1969); Duncan v. Louisiana, 391 U.S. 145, 159-161 (1968); U.S. v. Jenkins, 734 F.2d 1322 (9th Cir. 1983); United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977). Generally, petty offenses are those with a maximum penalty of up to six months imprisonment and a $500

fine. See Baldwin v. New York, 399 U.S. 66, 71 (1970); Duncan v. Louisiana, 391 U.S. 145, 159 (1968); United States v. Arbo, 691 F.2d 862, 863 (9th Cir. 1982); United States v. Hamden, 552 F.2d 276 (9th Cir. 1977).

On the other hand, the maximum authorized penalty is not the only relevant factor in determining whether an offense is serious or petty. United States v. Craner, 652 F.2d 23 (9th Cir. 1981); United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). In Craner, the court said:

> "Although Congress has established the sanctions of six months' imprisonment or $500 in fines as the bright line between serious and petty offenses, see 18 U.S.C. § 1(3), the Supreme Court, has not found 'talismanic significance' in this formula when determining whether a constitutional right to a jury trial exists."

Craner, 652 F.2d at 25, citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975). The

Ninth Circuit Court of Appeals also said:

> Justice White, writing for three members of the Court in Baldwin, stated that "a potential sentence of more than six months' imprisonment is sufficiently severe by itself to take the offense out of the category of "petty". No member of the Court expressed the view that a lesser potential sentence requires classification of an offense as petty.

Craner, 652 F.2d at 25.

Some factors other than the maximum authorized penalty that reflect the seriousness with which society regards an offense are the collateral consequences of a conviction, United States v. Craner, 652 F.2d 23 (9th Cir. 1981); the nature of the offense, United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976); and the treatment of the offense at common law, Id.

In United States v. Craner, 652 F.2d 23 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that the offense of driving under the influence of alcohol in Yosemite

National Park is a serious offense. See also, U.S. v. Woods, 450 F.Supp. 1335 (D. Md. 1978). The defendant in Craner was found to have a constitutional right to a jury trial. In holding that the offense is serious the court looked at factors other than the maximum authorized penalty for the offense, which was six months' imprisonment and a $500 fine.

The court primarily looked to the fact that if convicted of driving under the influence of alcohol in Yosemite National Park, Craner could have lost his California driver's license. Craner, 652 F.2d at 25. The court said that "[a]lthough a license revocation is itself a regulatory, not a punitive action, United States v. Best, 573 F.2d 1095, 1099 (9th Cir. 1978), the threat of loss of a license as important as a driver's license, a deprivation added to penal sanctions, is another sign that the DUI defendant's community does not view DUI

as a petty offense." Craner, 652 F.2d at 26.

The court also looked to District of Columbia v. Colts, 282 U.S. 63 (1930) in which the Supreme Court held that reckless driving was both indictable at common law and malum in se, and hence, serious. Craner, 652 F.2d at 26.

Finally the court looked to the relevant state and federal practice, pointing out that "[a]t least seven of the states in this Circuit guarantee the D.U.I. defendant the right to a jury trial."[2] Craner, 652 F.2d at 27.

Driving under the influence of alcohol in Yosemite National Park is a violation of regulations promulgated by the Secretary of Interior. See 16 C.F.R. § 4.6 (1980). The penalty imposed for the offense was the greatest the Secretary had power to impose. 16 U.S.C. § 3. Judge Sneed, concurring in the result only, said

that he would not have looked beyond the maximum authorized punishment had the punishment been established by a legislature instead of by the Secretary of Interior, whose power to impose punishments for the offense was limited. Craner, 652 F.2d at 27-28 (Judge Sneed, concurring). See also United States v. Arbo, 691 F.2d 862, 864 (1982).

However, as noted above, the maximum authorized penalty for an offense is not the sole criterion reflecting the seriousness with which society regards an offense. United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). The cases are unclear as to exactly when and to what extent other criteria are important. In this case, because of the clear import of other criteria, the Court must look beyond the maximum authorized penalty.

In the case at bar, the nature of the offense, the collateral consequences of a

conviction for the offense, and the fact that the penalty for the offense includes mandatory imprisonment are factors that reflect the seriousness with which society regards the offense of driving while intoxicated. These are factors that cannot be ignored in deciding whether the petitioner has a constitutional right to a jury trial.

In 1983, NRS § 484.3792 was amended to provide that the offense of driving while intoxicated is punishable by payment of tuition for and attendance of an educational course on the abuse of alcohol and controlled substances, imprisonment for not less than two days nor more than six months in jail (or performance of forty-eight hours of work for the community), and a fine of not less than $200 nor more than $1,000.[3] 1983 Nev. Stat. 1068-1072. The Nevada legislation rendered a jail sentence a mandatory part of the penalty for

commission of the offense of driving while intoxicated. The Nevada statute also provides:

> 3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial.

NRS § 484.3792. Such provisions are rare. So is the provision for mandatory imprisonment upon conviction. Even some of the most heinous crimes are not punishable by mandatory imprisonment without the possibility of release on probation. The requirement by the Nevada legislature that people convicted of driving while intoxicated face jail time is a clear indication that the offense is regarded as

serious.

Further, under Nevada statutes, there are important collateral consequences of a conviction for driving while intoxicated. As was the case in Craner, 652 F.2d 23 (9th Cir. 1981) the petitioner here faced loss of his driver's license as a collateral consequence of a conviction for driving while intoxicated. NRS § 484.384. Driving is nearly imperative to the ability of many people to earn a living. It is a privilege highly regarded by most people. This is especially true in Nevada, where great distances between population centers are common. The automatic license revocation that occurs pursuant to NRS § 484.384 is an indication that the Nevada legislature and, by representation, the people of Nevada regard driving while intoxicated as a serious offense. See Craner, 652 F.2d 23 (9th Cir. 1981); United States v. Woods, 450 F.Supp. 1335 (D. Md. 1978); Brady v.

Blair, 427 F.Supp. 5 (S.D. Ohio 1976).

Another consequence of a conviction for driving while intoxicated in Nevada is that, if the offender is convicted again within seven years of the offense, the minimum penalty increases. The second-time offender would then face mandatory imprisonment of not less than ten days and a fine of not less than $500. NRS §484.3792. Conviction of a third offense within seven years carries penalty of imprisonment in the state prison for not less than one year nor more than six years and a fine of not less than $2,000 nor more than $5,000. NRS § 484.3792. This system of increasing penalties sets the offense of driving while intoxicated apart from most offenses. This collateral consequence of conviction is one that did not exist in the Craner case. It is another indication that the legislature views driving while intoxicated as a serious offense.

Finally, this Court does not hesitate in classifying as malum in se the actions of one who after consuming alcohol endangers the lives of countless people by getting behind a wheel and driving at the high speeds and in the crowded conditions common on today's roads.

In recent years, society, generally, has shown great concern for the problem of intoxicated drivers on the roads. Citizens have organized groups to increase public awareness of the problem and to lobby for more severe penalties. The names of people convicted of driving under the influence of alcohol are published regularly in newspapers. See e.g., Reno Gazette-Journal, September 6, 1986, at 3D; Reno Gazette-Journal, September 21, 1986, at 5D; Reno Gazette-Journal, September 22, 1986, at 2C.

In view of the automatic license revocation and mandatory jail sentence that

accompany a conviction for driving while intoxicated, in view of the system of increasing minimum punishments for subsequent offenses, and in view of the opprobrious nature of the offense, it is apparent that driving while intoxicated is an offense regarded as serious by the people of the State of Nevada. It is an offense serious enough to require a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

In State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983), the Nevada Supreme Court held that a defendant charged with driving while intoxicated under NRS § 484.379 was not guaranteed a jury trial by the United States Constitution. The Nevada Supreme Court had before it the penalties for driving while intoxicated as they stood prior to the 1983 amendments. See 1983 Nev. Stat. 1068-1072. The penalty for a

first offense at that time did not include a mandatory jail sentence; nor did it include automatic driver's license revocation. 1983 Nev. Stat. 1068-1070. The penalty for a first offense prior to 1983 was tuition for and attendance of a course on the abuse of alcohol and controlled substances, a fine of not less than $100 nor more than $1,000, and/or imprisonment for not more than six months. Id. Only the course and the time were mandatory. Id. In Smith, the Nevada Supreme Court was looking at a statute different from the one this Court has before it.

Even though it was looking at a statute mandating lighter punishments than does NRS § 484.3792 the court in Smith had difficulty with the law already established by the Ninth Circuit Court of Appeals in the cases of United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977)[4] and United States

v. Craner, 652 F.2d 23 (9th Cir. 1981). Smith, 99 Nev. at 810, 672 P.2d at 634 ("With all respect to the court, we decline to follow the Ninth Circuit's holding." Smith, 99 Nev. at 810, 672 P.2d at 634).

Moreover, in determining whether or not the offense was serious for purposes of the right to a jury trial, the court in Smith looked only to the maximum imprisonment authorized as a penalty for driving while intoxicated. Smith, 99 Nev. at 809-810, 672 P.2d at 633-634. The court's analysis was too restricted.

Driving while intoxicated is a deadly crime. The people of the State of Nevada, through their legislature and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime. Under the Fourteenth Amendment the State of Nevada cannot deny people charged with driving while intoxicated the right to a jury trial.

This Court is aware of the expense involved in providing jury trials for defendants charged with driving while intoxicated. This Court is also aware that prosecution for driving while intoxicated now occur in Nevada's municipal courts, courts which by statute cannot accommodate jury trials. See NRS § 266.550. These are difficult problems. However, they are not reasons to deny jury trials in cases in which the Constitution guarantees them.

THE COURT, THEREFORE, FINDS that the petitioner's misdemeanor conviction for diving while intoxicated is unconstitutional and invalid.

IT IS, THEREFORE, HEREBY ORDERED that a writ of habeas corpus is GRANTED to petitioner, and petitioner is hereby relieved from all further consequences of the said conviction. The Clerk of the Court shall enter judgment in accordance

...

with this order.

DATED: September 26th, 1986

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

Footnotes

1. There is one exception to the punishment described. A person found guilty of driving while intoxicated for the first time may apply to the court to undergo a program of treatment for alcoholism or drug abuse if he is classified as an alcoholic or abuser of drugs by one certified to make that classification and if he agrees to pay the costs of the treatment. The first offender who is allowed to undergo such treatment must still serve a one-day term in jail or perform twenty-four hours of work for the community. The treatment must last at least one year and cannot exceed three years. During the treatment, the offender may be confined in an institution or, at the discretion of the facility, released for treatment or supervised aftercare in the community. If the offender accepts such treatment, final sentencing is postponed. After successful treatment, the offender may not be sentenced to more than one day in jail (or twenty-four hours of community work) and/or $200. If the offender is not accepted for treatment or fails to complete the treatment satisfactorily, he must be

sentenced to the fine and imprisonment to which he would have been sentenced had he not been allowed treatment; such imprisonment is reduced by time equal to that which he served before beginning treatment. NRS §§ 484.3792, 484.3794.

2 By actual count the Craner court found eight states with authority requiring a jury trial in DUI cases. The court in Craner pointed to the following authorities:

Alaska: Baker v. Fairbanks, 471 P.2d 386 (Alaska 1970).

Arizona: Rothweiler v. Superior Ct., 100 Ariz. 37, 410 P.2d 479 (1966).

California: Mills v. Municipal Ct., 10 Cal.3d 288, 110 Cal.Rptr. 329, 515 P.2d 273 (1973); Cal. Const. art. I, § 16; Cal.Penal Code § 689 [see also Cal.Veh.Code § 23152.]

Hawaii: State v. Shak, 51 Haw. 612, 466 P.2d 422, cert. denied, 400 U.S. 930, 91 S.Ct. 191, 27 L.Ed.2d 190 (1970). [See also State v. O'Brien, 704 P.2d 883 (Hawaii 1985).]

Idaho: Miller v. Winstead, 75 Idaho 262, 270 P.2d 1010 (1954) (held that under former law, defendant had right to jury trial de novo on appeal from municipal court judgment), Idaho Code §§ 19-1901, 19-1902. [See

also Idaho Code §§ 18-8004, 18-8005.]

Montana: Mont.Rev.Codes Ann. §§ 46-16-102, 46-17-201, 46-17-403.

Oregon: Brown v. Multnomah Cty. Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977). [See also Or. Const. art. 1 § 11; Or. Rev. Stat. §§ 813.010, 813.020.]

Washington: State v. Wicke, 91 Wash.2d 638, 591 P.2d 452 (1979).

Craner, 652 F.2d at 27, n.5.

All of the above states except Hawaii ground the right to trial by jury which would apply in DUI cases on either the state's constitution or statutes. The Hawaii Supreme Court, in State v. O'Brien, 704 P.2d 883 (Hawaii 1985), ruled that the United States Constitution affords a right to trial by jury in DUI cases. It is notable that Nevada is the only state in the Ninth Circuit that does not find any right to a jury trial in DUI cases.

3 For the one exception to this sentencing scheme see footnote 1, supra.

4 In United States v.Hamdan, 552 F.2d 276 (9th Cir. 1977) the Ninth Circuit Court of Appeals held that a defendant charged w'th an offense punishable by imprisonment of not

more than six months, a fine of not more than $1,000, or both, was entitled to a jury trial. The offense in Hamden was the making of false statements in documents filed with the Immigration and Naturalization Service. See 8 U.S.C. § 1306(c). The court determined that the offense was serious by looking to 18 U.S.C. § 1(3) which then classified as petty an offense punishable by imprisonment of up to six months and fine of up to $500. 98 Stat. 3138. In October, 1984, 18 U.S.C. § 1(3) was amended to put the monetary line between petty and serious at a fine of $5,000. Id. Thus, while Hamdan supports this court's holding, the weight of that case's authority is unclear because of the amendment of 18 U.S.C. § 1(3). It is unnecessary to rely on Hamdan in this case. An analysis of all relevant factors indicates that driving while intoxicated is a serious offense in Nevada. Fine distinctions concerning the amount of the maximum authorized fine are not of great help in determining the seriousness with which society views an offense.

ALABAMA	Birmingham v. Evans, 300 So. 2d 396 (Ala. 1974); § 15-14-30, Ala. Stat.
ALASKA	Baker v. City of Fairbanks, 471 P.2d 386 (Alaska S.Ct. 1970); Art. I, §11, Alaska Const.
ARIZONA	Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479 (1966)
ARKANSAS	Johnson v. City of Pine Bluff, 525 S.W.2d 76 Ark. 1975); Ark. Stat. Ann. § 44-115; Stat. Ann., §43-2105; Ark. Const., Art. 2, §§7, 10, Amendment No. 16.
CALIFORNIA	Code of Civil Procedure, § 194
COLORADO	C.R.S. 13-10-114, C.R.S. 16-10-109
CONNECTICUT	State v. Englehart, 158 Conn. 117, 256 A.2d 231 (1969).
DELAWARE	Driving Under the Influence Statute 21 §4177- $60.00-$200.00 fine, or imprisonment not less than 60 days nor more than 6 months or both; Art. I, §6, Del. Const. right to Jury Trial; State ex rel. Colatriano v. Colatriano, 301 A.2d 531 (Del. 1972), Jury required if offense carries the potential of 90 days in jail or more. It

	is uncertain whether the rule applies to the court of first instance, or on Appeal de novo.
DISTRICT OF COLUMBIA	Driving Under the Influence Statute §40-609; Trial by Jury allowed if defendant may be imprisoned for more than ninety (90) days, or fined mor than $300.00. See, Hall v. District of Columbia, (App. 1976) 353 A.2d 296.
FLORIDA	West's F.S.A. §322.262 (as amended)
GEORGIA	Collins v. State, 154 Ga.App. 651, 269 S.E.2d 509 (1980); Driving Under the Influence Statute 68A-902; Bush v. State, 152 Ga.App. 598, 263 S.E.2d 499 (1979); Code §27-1901.
HAWAII	State v. Swain, 599 P.2d 282 (S.Ct. of Haw. 1979); §291-4, H.R.S.; State v. Villades, 520 P.2d 427 (S.Ct. of Haw. 1974); State v. Shak, 51 Haw, 612, 466 P.2d 422 (1970); N.R.Cr.P. Rule 5(e)(2).
IDAHO	§2-105; Art. I, §7, Idaho Const.
ILLINOIS	People v. Woerly, 50 Ill. 327, 278 N.E.2d 787 (1972); §103-6, Code of Criminal Procedure

INDIANA	Gillespie v. Gilmore, 307 N.E.2d 480 (Ind.Ct.App. 1974); Const. of Indiana, Art. I, §13, Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).
IOWA	State of Iowa v. Draste, 232 N.W.2d 483 (1975); Iowa Const., Art. I, §9, Iowa Code §813.3, Rule 45.
KANSAS	Jury of 6 in Dist. Court on Appeal §22-3404
KENTUCKY	K.R.S. 29A.270; North v. Russell, 540 S.W.2d 4 (Ky. 1975); Kentucky Const. §11
MAINE	State v. Sklar, 317 A.2d 160 (Me. 1974); Art. I, §6, Maine Const.
MARYLAND	Fisher v. State, 504 A.2d 626 (Md. 1986)
MASSACHUSETTS	M.G.L.A. c90 §24; M.G.L.A. c.263 §6; see also, "The De Novo Procedure, Assessment of its Constitutionality Under The Sixth Amendment Right To Trial by Jury and the Due Process Clause of the Fourteenth Amendment, Commonwealth v. Hesser, 307 N.E.2d 10 (Mass. 1974).
MICHIGAN	People of City of Battle Creek v. Burnett, 55 Mich.App. 649, 223 N.W.2d 110; People v. Goodwin, 69 Mich.App. 471, 245 N.W.2d 96 (1976); Cahill v.

	Fifteenth Dist. Judge, 70 Mich.App. 1, 245 N.W.2d 381 (1976); Const. 1963, Art. I, §20 (Mich.).
MINNESOTA	State v.Leininger, 176 N.W.2d 629 (Minn. 1970)
MISSOURI	State v. McClinton, 418 S.W.2d 55 (1967); Const., Art. I, §22; §546.040, Missouri statutes
MONTANA	§46-17-201, Montana statute
NEBRASKA	§24-536, R.S. Supp. 1974; State v. Young, 194 Neb. 544, 234 N.W.2d 196 (1975); State v. Soester, 199 Neb. 477, 259 N.W.2d 921 (1977); State v. Nielsen, 199 Neb. 597, 260 N.W.2d 321 (1977)
NEW HAMPSHIRE	State v. Morrill, 291 A.2d 604 (N.H. 1972); State v. Desppres, 220 A.2d 758 (N.H. 1966); N.H. Const. Part II, Art. 77; R.S.A. 502:18(supp.); RSA 502-A: 11; RSA 606:8
NEW YORK	Vehicle & Traffic §1192, Vol. 62A, McKinney's Consolidated Laws of New York (one (1) year in jail and/or $500.00 fine); People v. Brown, 426 N.Y.S.2d 128 (1980); People v. Dean, Misc. 2d, 426 N.Y.S.2d 418 (1980); Art. 6, §18, New York Const.

NORTH CAROLINA	Art. I, §13, North Carolina Const. G.S. §7A-196; State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 856 (1969)
NORTH DAKOTA	§40-18-15
OHIO	City of Mentor v. Giordano, 224 N.E.2d 343, 9 Ohio St.2d 140 (1967); Ohio Const. Section 5, Art. I, §2945.17, Revised Code
OKLAHOMA	§11-27-119, O.S.A.; Evans v. Lambert, 418 P.2d 217 (Okla.1966)
OREGON	§11 of Oregon's Bill of Rights, Ore. Const. Art. I, §11; Brown v. Multnomah County District Court, 280 Or. 95, 570 P.2d 52 (1977)
PENNSYLVANIA	Driving Under the Influence is a third class misdemeanor (75 Pa. C.S.A. §3731, and 18 C.P.S.A. §106). A third class misdemeanor is punishable by imprisonment of nor more than one (1) year. Art. I, §9 of the Penn. Const. grants the right to Trial by Jury (see also Art. I, §6. See also, Commonwealth v. Benson, 421 A.2d 383 (Pa. 1980)
RHODE ISLAND	Driving Under the Influence is considered a "serious" misdemeanor and carries a fine of $500.00 and possible imprisonment of up

	to a year in jail; §31-27-2, Rhode Island Statutes.
SOUTH CAROLINA	Driving Under the Influence statute, Code §56-5-2930; penalty §56-5-2940; County Courts §14-9-180; Municipal Courts §§14-25-10, 14-25-410, 14-25-610; see also, §14-7-1110 (peremptory challenges in criminal cases); State v. Gilliam, 242 S.E.2d 411 (S.C. 1978) State v. Dawkins, 232 S.E.2d 228 (S.C. 1977)
SOUTH DAKOTA	Parkham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972)
TENNESSEE	Tenn. Code Ann. 55-10-401; 55-10-403; Henerson v. State, 539 S.W.2d 843 (Tenn. 1976); State v.Lusky, 267 S.W.2d 106 (Tenn. 1954); Tenn. Const. Art. I, §6, and Art. 6, §14.
TEXAS	Texas Const. Art. I, §15; Art. 5, §17; Dillon v. State, 165 Cr.R. 217, 305 S.W.2d 956; Buck v. State (Cr.App. 1980) 599 S.W.2d 810
UTAH	§78-46-5; Trial de novo; jury trial of 4 jurors allowed, Salt Lake City v. West Gallery, Inc., 573 P.2d 1283 (1978); Art. I, §10, Utah Const.

VERMONT	Art. 10 and 12 of Chapter 1, Vermont Const.; State v. Becker, 287 A.2d 580 (Vt. 1972)
VIRGINIA	Virg. Code Ann. §18.2-266; §18.2-270; §19.2-262; Virg. Const. Art. I, §8; Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955); Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954)
WASHINGTON	RCWA 3.50.280; Artis v. Rowland, 64 Wash.2d 576, 392 P.2d 815 (1964)
WEST VIRGINIA	Art. 3, §14, West Virg. Const. Champ v. McGhee, 270 S.E.2d 445 (W.V. 1980)
WISCONSIN	First offense Driving Under the Influence is not a "crime", and carries a "penalty" of not less than $100.00 or more than $500.00. Art. I, §7 Wisc. Const. State ex. rel. Sauk County District Attorney v. Gollmar, 145 N.W.2d 670, 32 Wis. 2d 406 (1966)
WYOMING	Lapp v. City of Worland, 612 P.2d 868 (Wyo. 1980); Art. I, §9 Const. of Wyoming

States not allowing Jury Trials in Driving Under the Influence cases

LOUISIANA	§779 Trial of Misdemeanors: no jury trial allowed; §14.98 Driving Under the Influence statute, no more than 6 months and/or a fine of up to $400.00; City of Monroe v. Wilhite, 255 La. 838, 233 So.2d 535 (1970)
MISSISSIPPI	Clark v. State, 332 So.2d 415 (1975) but according to Code §63-11-31, upon conviction of second offense Driving Under the Influence, within 2-year period, penalty is 10 days minimum to one (1) year, and fined not less than $100.00 nor more than $1,000.00, or both
NEVADA	Present case before this court.
NEW JERSEY	State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970)
NEW MEXICO	Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959)

Supreme Court, U.S.
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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether this court should decline discretionary review of the Nevada Supreme Court opinion denying jury trials to persons charged with misdemeanor Driving Under the Influence (DUI) offenses in the municipal courts of the State of Nevada for want of a substantial federal question in view of the long-standing threshold between "petty" and "serious" offenses where the maximum authorized penalty is six months in jail.

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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS AND JUDGMENTS DELIVERED BELOW

The Petitioners, Melvin R. Blanton and Mark D. Fraley, seek certiorari from this Court to review the decision of the Supreme Court of Nevada reported in *Blanton v. North Las Vegas Municipal Court*, 103 Nev. Adv. Op. 135, 748 P.2d 494 (December 31, 1987) (reprinted in Appendix A to the Petition for Writ of Certiorari). The state supreme court consolidated

eleven cases on appeal or petition in various forms concerning the issue of jury trials in misdemeanor DUI prosecutions in Nevada municipal courts. The Supreme Court of Nevada denied the claim that there was any right to a jury trial for a misdemeanor DUI in Nevada where the maximum authorized penalty is six months in jail and a $1,000 fine. No petition for rehearing was filed by any party in the Supreme Court of Nevada.

JURISDICTIONAL STATEMENT AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A.

JURISDICTIONAL STATEMENT

Petitioners attempt to invoke the jurisdiction of this court under 28 U.S.C. Section 1257. Respondent submits that this Court should exercise its discretion under Rule 17.1 of the Rules of the Court by refusing to review the decision of the Supreme Court of Nevada. There is a lack of a substantial federal question in this case in view of the well established principle that no jury trial right exists for petty offenses where the maximum authorized penalty is six months in jail.

B.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Petition for Writ of Certiorari has set forth the pertinent text of the Federal and Nevada Statutes which are implicated in this case. Additionally, the United States Constitution, Article III, Section 2, paragraph 3, and the Sixth Amendment, as applied to the

states through the Fourteenth Amendment, are involved.

The text of the pertinent portions of the above Constitutional provisions are as follows:

Art. III, Section 2, paragraph 3: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . "

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

SUMMARY OF ARGUMENT

This Court should decline to review the decision of the Supreme Court of Nevada. Whether to grant review is a matter of judicial discretion, to be invoked only where special and important reasons exist for so doing, according to the provisions of Rule 17.1 of the Rules of the Court.

The Petition fails to present an important question of federal law in need of settlement by this Court. There is a want of a substantial federal question because of the well-defined nature of the dividing line between what constitutes a "petty" offense versus a "serious" offense. The Nevada Supreme Court decision denying jury trials for misdemeanor DUI offenses in Nevada where the maximum authorized penalty is six months in jail and a $1000 fine is in accord with pronouncements from this Court during the past twenty

years defining a petty offense as one subject to no more than a six month jail sentence.

Moreover, the Court rejected a request to review the identical issue presented by Petitioners when it dismissed an appeal last year for want of a substantial federal question. No new arguments or authorities arising since that decision have been cited by Petitioners.

The Ninth Circuit Court of Appeals has rendered decisions which on their face appear to conflict with the Nevada Supreme Court decision in this case. However, the Fifth Circuit Court of Appeals issued an opinion, *en banc*, on March 17, 1988 which, *inter alia*, explains why those Ninth Circuit decisions are an anomaly and contradict firmly established principles enunciated by this Court regarding when the right to a jury trial attaches.

ARGUMENT

A basic principle of law deeply rooted in the historical practice of the Colonies and the original states declares that, under the Constitution, no person is entitled to a trial by jury for a petty offense. *Baldwin v. New York*, 399 U.S. 66 (1969). This Court has refined, through a series of decisions emanating with *Duncan v. Louisiana*, 391 U.S. 145 (1968), a clear-cut definition of "petty offense": an offense which is subject to a maximum term of incarceration of six months or less. *Baldwin, supra; Frank v. United States*, 395 U.S. 147 (1969); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).

As recently as April of 1987 this Court dismissed an appeal for want of a substantial federal question in *Bairnsfather v. Louisiana*, ___ U.S. ___, 107 S.Ct. 1620, 95 L.Ed.2d 195 (April 6, 1987), which offered the same issue for review put forth by Petitioners herein. Bairnsfather requested a jury trial when he was charged in the Louisiana courts with second offense Driving While Intoxicated (DWI), mandating a thirty day to six month jail sentence and a mandatory $300 to $500 fine. Bairnsfather presented essentially the same issues and arguments as Petitioners would in support of their contention that they are entitled to a jury trial under the Sixth Amendment. The thrust of the argument is that certain collateral consequences attendant to a DWI conviction, along with minimum mandatory punishment, elevate a "petty" offense into a "serious" offense requiring a jury trial under the Constitution. See *Landry v. Hoepfner*, 840 F.2d 1201, 1210-1211 (5th Cir. *en bank* 1988).

Petitioners advanced no new arguments or authorities arising since the Court dismissed the *Bairnsfather* Appeal to convince this Court to grant a review of their case. Moreover, " . . . by dismissing the appeal for want of a substantial federal question, the Supreme Court in *Bairnsfather* did reach and so resolve the substantive merits of the appeal, ... *Bairnsfather* is thus a ruling on the merits with precedential value, albeit with less such value than an opinion of the Court after full briefing and argument." [Citations omitted]. *Id.*, at 1212.

In *Landry, supra,* the Fifth Circuit Court of Appeals, *en banc*, on March 17, 1988, reversed a decision of one of its panels, *Landry v. Hoepfner*, 818 F.2d 1169 (5th Cir. 1987) and hold that the United States Constitution does not require the states to provide the right of trial by jury for a first offense DWI. While noting that the maximum penalty prescribed was six months' imprisonment and a five hundred dollar fine, the Fifth Circuit found that this " . . . does not exceed that appropriate for 'petty' offenses under *Baldwin v. New York*, ..." *Landry, supra,* at 840 F.2d 1202.

Most importantly, the Fifth Circuit declared that the United States Supreme Court . . .

> " . . . has *never* held or stated any crime is a 'serious' rather than a 'petty' offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law. Otherwise put, the Court has never identified any particular offense as being nonpetty which was both not indictable at common law and carried a maximum authorized confinement of not more than six months." [Emphasis original]. *Id.*, at 1209.

Hence, the Petitioners' contention that certain minimum mandatory punishment, which is well under six months in jail, combined with various collateral consequences such as driver license revocation, social stigma, and increased insurance premiums, elevate a DUI from an otherwise petty offense into a serious offense allowing a right to a jury trial is without merit and clearly fails to present an important question of federal law. The law in this area has been settled by

this Court and therefore the Petition does lack a substantial federal question.

Further support for the Respondent's position that the Court should refuse to grant review of the Nevada Supreme Court decision can be found in *Frank, supra*, 395 U.S. at 148:

> "In determining whether a particular offense can be classified as 'petty', this Court has sought objective indications of the seriousness with which society regards the offense. . . .The most relevant indication . . . is the severity of the penalty authorized for its commission."

The Court also noted in *Baldwin* that " . . . we have sought objective criteria . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty." *Baldwin, supra,* 395 U.S. at 68. Petitioners seek to establish a new order whereby courts apply subjective criteria, such as collateral consequences of a conviction, to determine the seriousness of an offense on an *ad hoc* basis. The result would produce judicial opinions driven by the personal predilictions of the jurist authoring such an opinion. *Baldwin* and *Frank* counsel against this approach.

In *Landry*, the Fifth Circuit emphasized the point that this Court has refined the determination of when an offense is petty or serious, and therefore when a Constitutional right to a jury trial attaches: "Since Baldwin, the Court has spoken *only* in terms of the length of possible confinement as establishing the dividing line between 'petty' and serious offenses." [Emphasis original]. *Landry v. Hoepfner*, 840 F.2d at

1208. Therefore, Petitioners' reliance on certain collateral consequences and minimum mandatory punishment is misplaced and the Petition fails to present the requisite important question of federal law. Their argument runs contrary to a long line of decisions by the Court that the determinative factor is the maximum authorized period of confinement. See *Landry, supra,* at 1215-1216. Again, in *Landry*, the Fifth Circuit declared the following with reference to dismissal by this Court of the *Bairnsfather* appeal last year for want of a substantial federal question: "Clearly there is nothing in *Bairnsfather* which is in tension with or breaks new ground respecting *Duncan, Frank, Baldwin*, or *Codispoti*." *Id.*, at 1212.

The Nevada Supreme Court decision in *Blanton, supra,* strictly follows the principles delineated in the above cases from this Court. The opinion (reprinted in full in Appendix "A" to the Petition for Writ of Certiorari) draws heavily from *Baldwin* and concludes that the federal constitution does not require it to overturn the decision in *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983), which held that " . . . under the statutory penalties for DUI in Nevada, the United States Constitution does not guarantee the right to jury trials in misdemeanor DUI cases." (Appendix "A" to the Petition, page 32; also found at 748 P.2d at 501).

Petitioners place great reliance on three federal cases in support of their position: *United States v. Craner*, 652 F.2d 23 (9th Cir. 1981); *United States v. Best*, 573 F.2d 1095 (9th Cir. 1978); and *Bronson v. Swinney*, 648 F.Supp. 1094 (D. Nev. 1986), (appeal pending, 9th Cir.). Yet, the Nevada Supreme Court was

mindful of these cases and distinguished them as an " . . . unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin." *Blanton, supra,* at 500 (also in Appendix "A" to the Petition, page 31). *Landry, supra,* also distinguished the *Craner* case and found no convincing body of lower federal court decisions which have developed a clear consensus contrary to the plain meaning of the Supreme Court cases. *Landry, supra,* at 1214-1215.

Compare *Rife v. Godbehere*, 814 F.2d 563 (9th Cir. 1987), a prosecution for misdemeanor DUI from the Arizona state court system which held that such an offense became a serious offense allowing a jury trial right where the maximum fine had been increased from $500 to $1000, even though the maximum term of incarceration remained at six months.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to grant certiorari and summarily affirm the opinion of the Supreme Court of Nevada. Alternatively, this Court should deny a review of the Nevada Supreme Court decision and dismiss the Petition.

Respectfully submitted,

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Supreme Court, U.S.
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SEP 27 1988
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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF NEVADA

PETITIONERS' REPLY BRIEF

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QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving a vehicle while intoxicated under Nevada state law is a "serious" crime to which the right to jury trial applies.

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ARGUMENT

I.

Post-Baldwin Tests Used to Determine and Analyze the Right to Trial by Jury

In *Muniz v. Hoffman*, 422 U.S. 454 (1975), this Court, in determining whether a right to trial by jury existed for criminal co[illegible]pt pursuant to §10(1) of the Labor Management Relations Act, as amended, "capsulated" constitutional doctrine at 422 U.S. 475-76:

> (1) Like other minor crimes, "petty" contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial;
>
> (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary;
>
> (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial;
>
> (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Paragraph 2 is a restatement of the "nature of the offense" test, while paragraph 3 leaves the door open to consider punishment or penalties *other than* potential incarceration and fine. *Muniz* was decided the year after *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) which stated at 418 U.S. 512:

> Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes.

This author concludes that this Court utilized the *Baldwin, infra,* test in the *Codispoti* case because only a fine and incarceration were at issue. Further, *Baldwin v. New York,* 399 U.S. 66 (1970) was relied upon as authority, which case preserved the "nature of the offense" test. *Baldwin,* 399 U.S. at 69, n.6. The "nature of the offense" test, therefore, remains viable, and the consideration of penalties other than incarceration and fine has been legitimated.

In *Welsh v. Wisconsin,* 466 U.S. 740 (1984), a warrantless home DWI arrest case, Justice White joined by Justice Rehnquist, in dissent, set out certain factors which indicated the "seriousness" of the DWI offense under consideration there. 466 U.S. at 763. Going beyond mere incarceration and fine, one factor was found to be the right to trial by jury set by the legislature, and another factor was the consequence of mandatory driver's license revocation upon conviction of DWI. Cases relied upon as authority were *United States v. Craner,* 652 F.2d 23, 24-27 (CA9 1981); *United States v. Woods,* 450 F.Supp. 1335, 1340 (Md. 1978); *Brady v. Blair,* 427 F.Supp. 5, 9 (SD Ohio 1976), all DWI jury trial cases. The "nature of the offense" case of *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) was also cited.

These lower federal court decisions, *supra,* as well as analysis set out in *United States v. Jenkins,* 780 F.2d 472 (CA4 1986) and *Landry v. Hoepfner,* 840 F.2d 1201 (CA5 1988), never rely solely on a six-month incarceration "bright-line" standard. Invariably, the "nature of the offense" test, penalties beyond incarceration and fine, and the right to trial by jury in other State jurisdictions are placed into the mix, and balanced against the six-

month standard. The lower federal courts seem reticent to adopt a rigid, fixed test, as Respondent and its *amici* would have this Court do. Even *Landry v. Hoepfner, supra,* a decision which denied the right to trial by jury in a Louisiana state case, parsed each and every non-"bright-line" test, and argued it away.

Amicus State of Nevada complains that Petitioners' authority, *United States v. Craner, supra,* did not legitimate a "collateral consequences" test because the DWI offense there at issue arises from a federal regulation, not Congress as the Nation's surrogate. Petitioners urge this case to the Court's attention because it weighs maximum penalty and other factors about equally in determining the seriousness of the offense.

This Court is urged by Petitioners to retain the reliable, clear-cut *Baldwin* test, but to allow the lower State and Federal courts, at need, as in the case at bar, to evaluate the right to trial by jury by other criteria, *supra.* There are certain offenses, like the Nevada DWI law, which cannot be properly catalogued under the "bright-line" umbrella solely; such offenses cannot be isolated from other real, societal factors and forces that unquestionably gauge them "serious." These hybrid crimes seeking "serious" status, sharing elements of the petty and the serious, should be far and few between. To even imagine a petty crime that would burst onto the American landscape as this DWI offense has done, is difficult, and even that offense has taken 10 years to ripen.

II.

This Court Has Determined That DWI is a Serious Offense

In cases decided by this Court after *Baldwin v. New York,* 399 U.S. 66 (1970), the offense of DWI and its

societal consequences has been painted in somber tones. In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), a DWI case allowing the use of a Defendant's refusal to submit to a blood-alcohol test before the trier of fact as evidence of guilt, the majority prefaced its decision with these words:

> The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715, 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

These vivid passages illuminate " . . . an offense of a grave nature, affecting the public at large; . . . ". *Callan v. Wilson*, 127 U.S. 540, 556 (1888). This section of the *Neville* case, itself amply answers *amicus* State of Nevada's assertion (Br. 21) that " . . . Driving under the influence of liquor is not an inherently evil and injurious act as the act itself does not necessarily injure another person and is not universally considered as immoral . . . "

This Court has also expressed the belief that the prevention of drunken driving was properly a *major* concern to the States. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984); *Welsh, supra*, 466 U.S. at 755 (Blackmun, J., concurring), " . . . the child (drunk driver) is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's (drunk driver's) act." (Parentheses and content added); see also, *Welsh, supra*, 466 U.S. at 762-63 (White, J., dissenting).

Amicus State of New Jersey (Br. 21-22) concludes, without authority, that the alternate method of prosecuting drunk driving cases which focuses on 0.10% or more by weight of alcohol in the driver's blood, and de-emphasizes evidence of driving difficulty, field sobriety tests, and physical signs of intoxication. indicates that drunk driving is not a *malum in se* offense. On the contrary, this alternate, easily provable method of conviction attests the firm intent of every State to convict drunk drivers and deter others. See *Welsh, supra*, 466 U.S. at 763 (White, J., dissenting). It does not follow that an offense ceases to be "serious" or one *malum in se* just because a State makes the imminently logical choice to crack down on offenders by a surer, more efficient method of proof.

The cases of this Court, as few as they are, on DWI-related issues, clearly reflect the Nation's perception that the nature of the offense of DWI is "serious", a *malum in se* crime that is "immoral in its nature and injurious in its consequences." Compare, *Morrisette v. United States*, 342 U.S. 246 (1952). Indeed, Respondent and its *amici* cite no case from this Court which states that DWI, as presently constructed in most State jurisdictions and by the federal government, is not a crime *malum in se*; Petitioners have,

484.3792(1)(A)(2)) are far more embarrassing than 2 days in jail, and evoke significantly more public scorn and obloquy. Plea bargaining with a drunk-driving defendant is prohibited by statute (N.R.S. 484.3792(3)) unless the prosecuting attorney knows that the charge is not supportable.

Those and other "collateral consequences" in the State of Nevada set the drunk driving offense apart as a special crime. No offense in modern memory (except perhaps the death penalty) has evoked such public outcry and concern. To apply a strict "bright line" test is simply to mask and ignore "collateral consequences" that legitimately sanction and punish the convicted offender, especially those provisions which permit 2 previous non-jury drunk-driving misdemeanor convictions to boost a third-offense misdemeanor drunk-driving case to

felony status carrying one to six years in the Nevada State Prison, one year of which is non-probationable.

These draconian "collateral consequences" are set out in N.R.S. 484.3792 and N.R.S. 483.460 (mandatory revocation of driver's license), petition for writ of certiorari filed herein (pp. 11-18).

The offense of drunk-driving, at least as defined by Nevada statute, does not neatly fit under the "bright line" Duncan umbrella; a more introspective analysis is needed here.

Lastly, the City relies on this Court's dismissal of the appeal in Bairnsfather v. Louisiana, _____ U.S. _____, 107 S.Ct. 1620, 95 L.Ed.2d 195 (1987), for want of a substantial federal question. There Bairnsfather argued in his Jurisdictional Statement that drunk-driving was a "malum in se" offense and that this

fact together with statutory punishments and loss of driver's license upon conviction made the offense "serious."

The present petition uses the classic "nose counting" test of Duncan as well as specific Nevada statutory punishment, and therein lies the difference between this case and Bairnsfather, supra.

III.

CONCLUSION

For the above-cited reasons, this Court should grant the Petition and set the issue for briefing and oral argument.

Respectfully submitted:

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Attorneys for Defendants/Petitioners

IV.

CERTIFICATE OF SERVICE BY MAIL

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners,	)	No. 87-1437
vs.	)	NSCT. NO. 17940 (Blanton)
CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	NSCT. NO. 18065 (Fraley)

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

The undersigned hereby certifies and affirms that I am an Employee of the law office of JOHN J. GRAVES, JR., ESQ., attorney for Petitioner in the above-entitled matter, and a person of such age and discretion as to be competent to serve papers.

That on May 27th, 1988, I served three (3) copies of the foregoing REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF

CERTIORARI by depositing same in an enclosed envelope, first-class postage fully prepaid in the United States Mails, addressed as follows:

City of North Las Vegas
City Attorney's Office
400 East Stewart Avenue
Las Vegas, Nevada 89101

ATTORNEY GENERAL'S OFFICE
300 South Fourth #1100
Las Vegas, Nevada 89158

STATE OF NEVADA ATTORNEY GENERAL'S OFFICE
Heroes Memorial Building
Carson City, Nevada 89710

Theresa J. Cole, An Employee of
JOHN J. GRAVES, JR., ESQ.

...

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...

...

V.

CERTIFICATE OF MAILING BY
COUNSEL FOR PETITIONER

MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	)	No. 87-1437 NSCT. NO. 17940 (Blanton) NSCT. NO. 18065 (Fraley)

Pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, Counsel for Petitioner herein, a member of the Bar of this Court, Certifies that to his knowledge the Reply Brief in Support of Petition for Writ of Certiorari was mailed to this Court on the 27th day of May, 1988, within the permitted time to file said Reply, and that copies of the same were, on that date mailed to the North Las Vegas City Attorney's Office, Attorney General's Office, Las Vegas, Nevada,and State of

Nevada Attorney General's Office, Carson, City, Nevada.

DATED this 27th day of May, 1988.

John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.

SUBSCRIBED AND SWORN to before me this 27th day of May, 1988.

Theresa J. Cole
NOTARY PUBLIC in and for
Clark County, State of Nevada.

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...

THERESA J. COLE
OFFICIAL SEAL
NOTARY PUBLIC-NEVADA
CLARK COUNTY
My Appointment Expires Aug. 1, 1990

(5)

No. 87-1437

Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON,
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS,
NEVADA

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

JOINT APPENDIX

GRAVES, LEAVITT & KOCH
JOHN J. GRAVES, JR., ESQ.
601 South Sixth Street
Las Vegas, Nevada 89101
(702) 385-7277

Counsel for Petitioner
Melvin Ray Blanton

JOHN G. WATKINS, ESQ.
333 North Rancho Road,
#633
Las Vegas, Nevada 89106
(702) 646-3155

Counsel for Petitioner
Mark D. Fraley

CITY OF NORTH LAS VEGAS
ROY A. WOOFTER, ESQ.
NORTH LAS VEGAS
CITY ATTORNEY
MARK L. ZALAORAS, ESQ.
DEPUTY CITY ATTORNEY
2200 Civic Center Drive
North Las Vegas, NE 89030
(702) 649-0277

Counsel for Respondent
City of North Las Vegas

ATTORNEY GENERAL
State Mailroom Complex
Las Vegas, Nevada 89158
(702) 486-3420

PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 26, 1988
CERTIORARI GRANTED JUNE 20, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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CITY OF NORTH LAS VEGAS MUNICIPAL COURT
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin Ray
DOCKET/CASE NO. M2648-86
CHARGE: Driving Under the Influence of Alcohol

DATE	PROCEEDING
08/19/86	Defendant pled not guilty; Attorney appeared
06/21/88	Continued per City Attorney for Status Check to 12/15/88

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. M2408-86
CHARGE: Driving Under the Influence of Alcohol

DATE	PROCEEDING
07/15/86	Defendant Pled Not Guilty
10/28/86	Defense Motion for Jury Trial
10/28/86	Defense Motion for Jury Trial Denied
10/29/86	Change plea of guilty; fined $300.; Alcohol Vegas Verdes; Sentenced 5 days; Served 5 days (credit)
10/29/86	Accounts receivable $25.00 (O.R. on appeal per Judge Gary Davis); bond posted exonerated
11/04/86	Appeal filed

EIGHTH JUDICIAL DISTRICT COURT
CLARK COUNTY, STATE OF NEVADA
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin R.
DOCKET/CASE NO. A252811

DATE	PROCEEDING
12/30/86	**SET BRIEFING SCHEDULE**. Petitioner represented by counsel, John J. Graves, Jr. Respondents represented by counsel, DCA, Mark Zalaoras. Counsel submitted the matter on the Briefs. **COURT ORDERED**, under advisement.

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. C76512

DATE	PROCEEDING
12/12/86	**ARRAIGNMENT**. City of North Las Vegas represented by Mark Zalaoras, DCA. Defendant Fraley not present represented by John Watkins, Esq. Defendant is entering a not guilty plea. Had requested a jury trial which was denied.
01/30/87	**DEFENDANT'S MOTION TO DISMISS. COURT ORDERED**, previous order for continuance vacated and the Court having found jury demand was made in proper time, **ORDERED**, matter remanded to City of North Las Vegas for jury trial.
01/22/88	**AT REQUEST OF COURT**. Court received an Order from the Supreme Court directing this Court to vacate previous Sentence. **COURT ORDERED**, matter continued two

	weeks, Mr. Watkins to request a Stay Order from the Supreme Court.
03/11/88	**STATUS CHECK**. Court received Stay Order from Supreme Court, indicating Mr. Watkins has filed Writ of Certiorari with United States Supreme Court, **COURT ORDERED**, continued six months for status check.

SUPREME COURT OF THE STATE OF NEVADA
RELEVANT DOCKET ENTRIES

DEFENDANT: BLANTON, Melvin R.
DOCKET/CASE NO. 17940

DATE	PROCEEDINGS
02/25/87	Filing **RECORD ON APPEAL** (original).
05/26/87	**ORAL ARGUMENT** is set for 09/18/87 at 8:15 a.m. – 1 hour – Carson City.
06/22/87	Filing **APPELLANT'S OPENING BRIEF**
07/24/87	Filing **RESPONDENT'S ANSWERING BRIEF**
09/02/87	Filing **APPELLANT'S REPLY BRIEF**
09/18/87	**ORAL ARGUMENT**; Submitted.
12/31/87	Filing **OPINION** – "Affirm Docket No. 17940

DEFENDANT: FRALEY, Mark D.
DOCKET/CASE NO. 18065

DATE	PROCEEDING
04/13/87	Filing **PETITION FOR WRIT OF CERTIORARI.**
04/27/87	Filing **SUPPLEMENT OF RECORD BELOW TO PETITION FOR WRIT OF CERTIORARI.**
05/20/87	Filing **ORDER** we consolidate these cases for the purpose of oral argument (including No. 18065. We stay further proceedings against real party in interest Mark D. Fraley in North Las Vegas Municipal Court Case No. M-2408-86,

	pending our decision upon the merits of the petitions.
05/26/87	**ORAL ARGUMENT** is set for 09/18/87 at 8:15 a.m. – 1 hour – Carson City.
07/01/87	Filing **ANSWER TO PETITION FOR A WRIT OF CERTIORARI.**
09/18/87	**ORAL ARGUMENT**; Submitted.
12/31/87	Filing **OPINION** – grant petition No. 18065
12/31/87	Issuing **WRIT OF CERTIORARI**

NORTH LAS VEGAS MUNICIPAL COURT
CLARK COUNTY, NEVADA

THE CITY OF NORTH LAS VEGAS, Plaintiff, vs. MELVIN RAY BLANTON, Defendant.	)))))))	Case No. M2648-86 DEMAND FOR JURY TRIAL (Filed October 3, 1986)

COMES NOW, Defendant, MELVIN RAY BLANTON, by and through his attorney, JOHN J. GRAVES, JR., ESQ., and makes Demand for a Jury Trial on the within charge of Driving Under the Influence pursuant to the Sixth Amendment to the United States Constitution, and pursuant to the federal District Court Case of *Bronson v. Swinney*, CV-R-86-130, ECR, ordering a Jury Trial in Driving Under the Influence cases in the State of Nevada.

DATED: this 3rd day of October, 1986.

GRAVES, LEAVITT, CAWLEY & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for Defendant
601 South Sixth Street
Las Vegas, Nevada 89101

CERTIFICATE OF SERVICE BY MAIL

I hereby certify and affirm that on the 3rd day of October, 1986, I deposited for mailing a copy of the foregoing DEMAND FOR JURY TRIAL with postage fully prepaid thereon addressed to the following:

North Las Vegas City Attorney's Office
1928 N. Bruce
North Las Vegas, Nevada 89030

/s/
An employee of
JOHN J. GRAVES, JR., ESQ.

NORTH LAS VEGAS MUNICIPAL COURT
CLARK COUNTY, NEVADA

THE CITY OF NORTH LAS VEGAS, Plaintiff, vs. MELVIN RAY BLANTON, Defendant.	)))))))	Case No. M-2648-86 MOTION TO STRIKE DEMAND FOR JURY TRIAL

COMES NOW the CITY OF NORTH LAS VEGAS, by and through its attorney, ROY A. WOOFTER, City Attorney, by MARK L. ZALAORAS, Deputy City Attorney, and moves this Court to strike the demand for jury trial filed by the Defendant on Friday, October 3, 1986. This Motion is made and based upon the following Points and Authorities.

DATED this 9th day of October, 1986.

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By /s/ Mark L. Zalaoras
MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, NV 89030
Attorney for Plaintiff

POINTS AND AUTHORITIES

A. FACTS

The Defendant is charged pursuant to NRS 484.379 with Driving Under the Influence of Alcohol on July 18, 1986, at 9:10 p.m. in the 3500 block of East Lake Mead Boulevard, which is in the City of North Las Vegas.

The Defendant has filed a demand for jury trial based upon the Sixth Amendment to the United States Constitution and a federal district court decision announced last week in Reno, Nevada. The City Attorney's office has been apprised of the demand by virtue of the Municipal Court Clerk's Office supplying my office with a copy of the demand. Even though the City Attorney's office is immediately adjacent to the Court, Defendant has not provided for a receipt of copy to my office. He has however attached to his Demand a certificate of mailing specifying that a copy was mailed to this office.

The Demand for Jury Trial was filed October 3rd at 2:12 p.m. The trial date is scheduled for October 15, 1986 at 1:30 p.m.

B. ARGUMENT

The Defendant is not entitled to a jury trial for a misdemeanor DUI prosecution where the maximum authorized penalty is six (6) months in jail or less. In *State v. Smith*, 99 Nev. 806 (1983), the Nevada Supreme Court stated:

> "Persons are guaranteed the right to a jury trial by both art. I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both

> provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefore turns upon whether the offense charged is characterized as "serious" or "petty." See Duncan v. Louisiana, 391 U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, 90 S. Ct. 1886 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).
>
> In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.
>
> At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .
>
> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the

right to trial by jury does not attach. As NRS 48.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

See also Exhibit A attached hereto, which is a 1975 unpublished federal district court decision denying a jury trial for a misdemeanor prosecution. In the attached opinion, there is a lengthy and well documented legal history for not permitting jury trials for misdemeanor DUI prosecutions.

Respectfully submitted,

ROY A. WOOFTER, CITY ATTORNEY
City of North Las Vegas

By MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, NV 89030
Attorney for Plaintiff

RECEIPT OF COPY

RECEIPT OF COPY of MOTION TO STRIKE DEMAND FOR JURY TRIAL is hereby acknowledged this ___ day of October, 1986.

GRAVES, LEAVITT, CAWLEY & KOCH

By _____
601 South Sixth Street
Las Vegas, Nevada 89101
Attorneys for Defendant

CASE NO. ___

DEPT. NO. ___

IN THE MUNICIPAL COURT OF
THE CITY OF NORTH LAS VEGAS
COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS, NEVADA, Plaintiff,	)	DEMAND FOR JURY TRIAL
vs.	)	
MARK D. FRALEY, Defendant.	)	

COMES NOW, Defendant, MARK D. FRALEY, by and through his attorney JOHN G. WATKINS, ESQ. and requests an Order pursuant to Article I, Section 3 of the Nevada Constitution and the Sixth Amendment of the United States Constitution directing that the instant case be tried by jury.

This Motion is made and based upon the Points and Authorities filed herewith and all testimony as may be adduced at the hearing of this Motion.

DATED this 28th day of October, 1986.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

NRS 266.565 provides,

> "The practice and proceedings in the municipal court shall conform, as nearly as practicable, to the practice and proceedings of justices' courts in similar cases, *except that an appeal perfected transfers the action to the district court for trial anew.* The municipal court shall be treated and considered as a justices' court whenever the proceedings thereof are called into question."

Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by Jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

The United States Constitution, the Sixth Amendment holds,

> *"In all criminal prosecutions,* the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

Cf., *State v. Smith,* 99 Adv. Op. 172 (1983) (*State v. Smith,* is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith,* supra.) See also *Bronson v. Swinney,* et. al, #CV-R-86-130-ECR (Dist. Ct. of Nev., 10/1/86) where the court held that a defendant is constitutionally entitled to a jury trial in D.U.I. misdemeanor cases.

Respectfully submitted,

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.

Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing DEMAND FOR JURY TRIAL is hereby acknowledged this ___ day of October, 1986.

North Las Vegas
City Attorney's Office
By: _____

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN RAY BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	CASE NO. A251117 DEPT. NO. IV PETITION FOR WRIT OF MANDAMUS (Filed November 3, 1986)

TO: The Honorable GARY DAVIS, Municipal Judge of the North Las Vegas Municipal Court, North Las Vegas, Nevada

TO: The Honorable ROY WOOFTER, North Las Vegas City Attorney

TO: The Honorable D. BRIAN McKAY, Attorney General, State of Nevada

GREETINGS

The Petition of Melvin Ray Blanton by and through his attorney JOHN J. GRAVES, JR., ESQ., respectfully shows:

1. That the Petitioner makes application herein for a Writ of Mandamus (N.R.S. 34.150, et.seq.) to Order the North Las Vegas Municipal Court to grant a Jury Trial to your Petitioner on his driving under the influence charge pursuant to the Sixth Amendment to the United States Constitution.

2. No plain, speedy, or adequate remedy exists in law for your Petitioner other than by extraordinary Writ of this Court.

3. The Municipal Court Judge abused his discretion in denying Petitioner a Jury Trial on or about October 3, 1986, and should be compelled by this Court to exercise his duty, not his discretion, to Order said Jury Trial.

4. An indefinite Stay has been entered by the North Las Vegas Municipal Judge pending proceeding before this Court.

5. Petitioner requests that the City of North Las Vegas, Nevada, by and through its attorney, the North Las Vegas City Attorney, be Ordered to Answer the Petition herein, and to file Points and Authorities in answer to Petitioner's and to grant Petitioner a time to Reply.

6. Petitioner expressly brings this Petition to the Court solely on federal constitution issues, pursuant to the 1985 State of Nevada driving under the influence statute (N.R.S. 484.379, et seq.)

7. That no other Petition for Extraordinary Relief or appeal has heretofore been filed on behalf of said Petitioner on this particular issue.

WHEREFORE, Petitioner prays that this Honorable Court Order the North Las Vegas Municipal Court to grant Petitioner's Demand for Jury Trial.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for Petitioner
601 South Sixth Street
Las Vegas, Nevada 89101

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

MELVIN R. BLANTON, being first duly sworn upon his oath, deposes and says:

That he is the Petitioner in the above-entitled matter; that he has read the above and foregoing PETITION and knows the contents thereof to be true of his own knowledge except for those matters therein stated upon information and belief and as to those matters, he believes them to be true.

/s/ Melvin R. Blanton
MELVIN R. BLANTON

SUBSCRIBED and SWORN to before me
this 30th day of October, 1986.

/s/ Beverley J. Jones
NOTARY PUBLIC in and for said
County and State.

CASE NO. M2408-86

IN THE MUNICIPAL COURT OF
THE CITY OF NORTH LAS VEGAS
COUNTY OF CLARK, STATE OF NEVADA

THE CITY OF NORTH LAS VEGAS, NEVADA, Plaintiff,	)	NOTICE OF APPEAL
vs.	)	
MARK D. FRALEY, Defendant.	)	(Filed November 4, 1986)

TO: THE HONORABLE JUDGE OF THE MUNICIPAL COURT OF THE CITY OF NORTH LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, and

TO: THE CITY ATTORNEY FOR THE CITY OF NORTH LAS VEGAS, NEVADA.

YOU, AND EACH OF YOU WILL PLEASE TAKE NOTICE that MARK FRALEY, the Defendant in the above-entitled action, does hereby appeal to the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, from the judgment of the above-

entitled Court, finding the Defendant guilty of violating DRIVING UNDER THE INFLUENCE OF ALCOHOL and from sentence of said Court, being fined $300.00 and/or 0 days.

This Appeal is taken from questions of both law and fact.

DATED at Las Vegas, Nevada, this 3rd day of Nov., 1986.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF COPY of the above and foregoing NOTICE OF APPEAL is hereby acknowledged this 4th day of November, 1986.

NORTH LAS VEGAS, CITY
ATTORNEY'S OFFICE

By: /s/ Mark L. Zalaoras
Deputy City Attorney

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN RAY BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	CASE NO. 252811 DEPT. NO. VIII ANSWER TO PETITION FOR WRIT OF MANDAMUS Date of Hearing: 12/30/86 Time of Hearing: 9:00 A.M. (Filed December 30, 1986)

COMES NOW the Respondents, NORTH LAS VEGAS MUNICIPAL COURT; THE HONORABLE GARY DAVIS, JUDGE THEREOF; and the CITY OF NORTH LAS VEGAS, NEVADA, by and through their attorney, ROY A. WOOFTER, City Attorney, by and through MARK L. ZALAORAS, Deputy City Attorney, and for their Answer to the Petition for Writ of Mandamas respectfully admit, deny and allege as follows:

1. Respondents admit all of the allegations contained in Paragraph One of the Petition.

2. Respondents deny each and every allegation contained in Paragraph Two of the Petition.

3. Respondents deny each and every allegation contained in Paragraph Three of the Petition.

4. Respondents admit each and every allegation contained in Paragraph Four of the Petition.

5. Respondents admit all of the allegations contained in Paragraph Five of the Petition.

6. Respondents admit all of the allegations contained in Paragraph Six of the Petition.

7. Respondents are without sufficient knowledge and information so as to form a belief as to the truth of the allegations contained in Paragraph Seven of the Petition, and therefore deny the same on that basis.

WHEREFORE, Respondents pray that this Honorable Court deny the Petition and that Petitioner take nothing by virtue of his application for a Writ of Mandamus.

Respectfully submitted,

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By: /s/ Mark L. Zalaoras
MARK L. ZALAORAS
Deputy City Attorney
1301 East Lake Mead
North Las Vegas, Nevada 89030
Attorney for Respondents

STATE OF NEVADA)
ss:
COUNTY OF CLARK)

MARK L. ZALAORAS, being first duly sworn, deposes and says:

That he is the attorney for the Respondents in the above-entitled action; that he has read the foregoing

ANSWER TO PETITION FOR WRIT OF MANDAMUS and knows the contents thereof; that the same is true of his own knowledge, except for those matters therein contained stated upon information and belief, and as to those matters he believes it to be true.

/s/ Mark L. Zalaoras
MARK L. ZALAORAS

SUBSCRIBED and SWORN to before me this 30th day of December, 1986.

/s/ Nancy Ralston
NOTARY PUBLIC

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN R. BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	)	CASE NO. 252811 DEPT. NO. VIII DOCKET "M" DECISION AND ORDER (Filed January 14, 1987)

The Petitioner seeks Mandamus to compel the North Las Vegas Municipal Court to grant Petitioner a jury trial on a misdemeanor charge of Driving Under the Influence of Alcohol.

Petitioner relies on the recent case of *Bronson v. Swinney*, decided September 29, 1986, in the United States District Court, District of Nevada CV-R-86-130-ECR.

Notwithstanding the holding in that case, this Court finds that the decision in *State v. Smith*, 99 Nev. 806 (1983) is dispositive of the issue.

The petition for the Writ of Mandamus is denied.

IT IS SO ORDERED.

DATED this 14th day of January, 1987.

/s/ Michael Wendell
DISTRICT JUDGE

DISTRICT COURT
CLARK COUNTY, NEVADA

MELVIN R. BLANTON, Petitioner, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, (Real Party in Interest)	)	CASE NO. 252811 DEPT. NO. VIII NOTICE OF APPEAL (Filed January 27, 1987)

TO: THE HONORABLE GARY DAVIS, JUDGE, NORTH LAS VEGAS MUNICIPAL COURT;

TO: CITY OF NORTH LAS VEGAS, NEVADA:

NOTICE IS HEREBY GIVEN that Petitioner/Appellant, MELVIN R. BLANTON, by and through his attorney of record, JOHN J. GRAVES, JR., ESQ., appeals the "Decision and Order" of the District Court dated and filed January 14, 1987, denying his Petition for Writ of Mandamus requesting a jury trial on Blanton's misdemeanor charge of driving under the influence of intoxicating liquor (first offense), to the Nevada Supreme Court.

DATED this 16th day of January, 1987.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.
Attorney for
601 South Sixth Street
Las Vegas, Nevada 89101

CERTIFICATE OF MAILING

I hereby certify that on the 16th day of January, 1987, I served the foregoing NOTICE OF APPEAL on the following attorney by depositing copies of same in sealed envelopes in the United States Mail, postage fully prepaid, addressed as follows:

ROY A. WOOFTER, ESQ.
North Las Vegas City Attorney
2200 Civic Center Drive
North Las Vegas, Nevada 89030

D. BRIAN MCKAY, ESQ.
Attorney General
Capitol Complex
Carson City, Nevada 89710

/s/ Honorine E. Fugitt
Honorine E. Fugitt, an employee of
GRAVES, LEAVITT & KOCH

DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Appellant, vs. MARK D. FRALEY, Respondent.	)	Case No. C 76512 Dept. No. XI Docket No.

DEMAND FOR JURY TRIAL

Hearing Date: ___
Hearing Time: ___

(Filed January 29, 1987)

COMES NOW, Defendant, MARK D. FRALEY, by and through his attorney JOHN G. WATKINS, ESQ. and requests an Order pursuant to Article I, Section 3 of the Nevada Constitution and the Sixth Amendment of the United States Constitution directing that the instant case be tried by jury.

This Motion is made and based upon the Points and Authorities filed herewith and all testimony as may be adduced at the hearing of this Motion.

DATED this 29th day of January, 1987.

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

POINTS AND AUTHORITIES

Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by Jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

The United States Constitution, the Sixth Amendment holds,

> *"In all criminal prosecutions,* the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

Cf., *State v. Smith,* 99 Adv. Op. 172 (1983) (*State v. Smith,* is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith,* supra.) See also *Bronson v. Swinney,* et. al., #CV-R-86-130-ECR (Dist. Ct. of Nev., 10/1/86) where the court held that a defendant is constitutionally entitled to a jury trial in D.U.I. misdemeanor cases.

Respectfully submitted,

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Defendant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

RECEIPT OF COPY

RECEIPT OF A COPY of the above and foregoing DEMAND FOR JURY TRIAL is hereby acknowledged this 29th day of January, 1987.

ROY A WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By: /s/ Mark L. Zalaoras
Mark L. Zalaoras
Deputy City Attorney

DISTRICT COURT
CLARK COUNTY, NEVADA

MARK D. FRALEY, Appellant, vs. CITY OF NORTH LAS VEGAS, Respondent.	)	Case No. C 76512 Dept. No. XI Docket No.

DECISION AND ORDER

(Filed February 13, 1987)

Appellant seeks relief in this Court through appeal pursuant to NRS 266.595. He asserts that he was denied his constitutional right to a jury trial by the municipal court below.

The first issue to be decided is whether an individual is constitutionally entitled to a jury trial for alleged violations under NRS 484.379, misdemeanor D.U.I. If the answer is in the affirmative then a second issue arises.

Can NRS 266.550 be used to deny a constitutionally guaranteed right to trial by jury?

It must first be noted that Municipal courts are constitutionally authorized and created by the legislature. See Article 6, Section 1 of the Nevada Constitution. This does not make them inferior but rather, once created, they exist as a co-equal branch of local government and are part of the constitutional judicial system of this state. See *City of North Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 550 P. 2d 399 (1976). The functions of the municipal court are as truly judicial in character as those of any other court of this state. The constitutional umbrella of protection extends to all courts of this state in exercising their judicial functions. Id. at 295.

In *Bronson v. Swinney*, CV-R-86-130-ECR (10-1-86), Federal District Judge Edward C. Reed held that individuals are constitutionally entitled and guaranteed a trial by jury when charged with a violation of NRS 484.379. This Court agrees with Judge Reed's analysis that these offenses are indeed "serious" and finds his decision to be "persuasive authority". NRS 484.379 convictions require mandatory jail (or performance of forty-eight hours of community work wearing distinctive garb indicating that the person has violated the D.U.I. law), automatic revocation of an individuals driving privilege for ninety days and can be used to enhance punishment requiring mandatory incarceration in the Nevada State Prison. *State v. Smith*, 99 Nev. 806, 672 P. 2d 631 (1983) was a pre-1983 NRS 484.379 violation which did not require mandatory jail or automatic revocation of the drivers license and is therefore distinguishable.

This court believes that individuals such as Appellant have a constitutional right to a jury trial. Further, any statute which denies this right is unconstitutional.

GOOD CAUSE Appearing,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that individuals charged with violations of NRS 484.379 as amended in 1983 are constitutionally entitled to a jury trial.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that in so far as NRS 266.550 prevents or denies jury trials for D.U.I. misdemeanor cases, it is unconstitutional.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the above entitled case is remanded to the North Las Vegas Municipal Court for a jury trial on the D.U.I. charge.

DATED this 12th day of February, 1987.

Myron E Leavitt
DISTRICT JUDGE

for Addeliar D. Guy

Submitted by:

/s/ John G. Watkins
JOHN G. WATKINS, ESQ.
Attorney for Appellant
333 N. Rancho Dr., #633
Las Vegas, Nevada 89106

CASE NO:

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS, NEVADA,
Petitioner,

vs.

ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
(Filed April 13, 1987)

TO: THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

MARK L. ZALAORAS, being first duly sworn, deposes and says:

1. That he is an attorney duly licensed to practice law in the State of Nevada and is a Deputy City Attorney for the City of North Las Vegas, Nevada.

2. That he is the prosecuting attorney assigned by the City Attorney for the City of North Las Vegas to prosecute the Eighth Judicial District Court case number C76512,which is a misdemeanor appeal before such Court from the conviction of Mark D. Fraley for Driving Under

the Influence of Intoxicating Liquor entered on October 23, 1986 by the Honorable Gary Davis, Judge of the Municipal Court for the City of North Las Vegas, Nevada,

3. That he has personal knowledge of the events described herein based upon his position as prosecutor for the original Municipal Court case as well as for the appeal of the misdemeanor conviction.

4. That his Petition by affidavit is brought as an application for a writ of certiorari pursuant to NRS 34.010 through NRS 34.140; that jurisdiction for issuance of such a writ is based upon NRS 34.020(2) and (3) because Respondent exceeded the jurisdiction of his office during the exercise of judicial functions by entering an order remanding the appeal to the North Las Vegas Municipal Court without holding a trial de novo on appeal, and by ruling that NRS 266.550 is unconstitutional as it denies jury trials to persons charged with misdemeanor DUI offenses. That there is no appeal from such order, nor does Petitioner have any plain, speedy or adequate remedy.

5. That Petitioner seeks review of the Decision and Order entered on or about February 13, 1987 by the Honorable Addeliar D. Guy in case number C76512 in the Eighth Judicial District Court of the State of Nevada, a copy of which is attached hereto as Exhibit "A".

6. That good cause exists for review by this Court of such order in that District Judge Guy granted a pretrial motion by Appellant Mark Fraley which challenged the Municipal Court conviction for failure to provide a jury trial and remanded the case for a trial by jury; that such action by Respondent exceeded his jurisdiction by not

conducting a new trial on the appeal as required for appeals to district from municipal courts; that the order by Respondent declared NRS 266.550 to be unconstitutional as it denies jury trials to persons charged with misdemeanor DUI offenses, whereas this Court in *State v. Smith*, 99 Nev. 806 (1983) held that such persons are hot entitled to trial by jury, and therefore the Respondent further exceeded his jurisdiction by such order.

WHEREFORE, Affiant prays that a writ of certiorari or other appropriate writ may be issued out of this Court to the Judge of the Eighth Judicial District Court, Department No. XI, the Honorable Addeliar D. Guy, commanding him to certify and return to this Court copies of all motions, pleadings, findings, orders, rulings, judgments, minute orders, and records on file, and Affiant further seeks a stay of proceedings in both the Municipal Court for the City of North Las Vegas and the Eighth Judicial District Court of the State of Nevada pending final determination of this application, and ultimately for an order from this Court commanding Respondent to make a determination of the misdemeanor appeal filed by Appellant Mark Fraley based upon a trial de novo before that Court, and for such other and further relief as may be proper in the premises.

ROY A. WOOFTER, CITY ATTORNEY
CITY OF NORTH LAS VEGAS

By /s/ MARK L. ZALAORAS
MARK L. ZALAORAS
Deputy City Attorney
Attorney for Petitioner

SUBSCRIBED and SWORN to before me
this 8th day of April, 1987.
/s/ Sarah Lee Johnson
Notary Public

STATEMENT OF THE ISSUES

I. Whether Respondent exceeded his jurisdictional authority by reversing the conviction obtained in Municipal Court and remanding the case to that Court for a new trial by jury instead of deciding the misdemeanor appeal on a trial de novo?

II. Whether Respondent exceeded his authority by ruling that NRS 266.550 is unconstitutional as it denies persons charged with misdemeanor DUI offenses a jury trial?

A. Whether the ruling in *State v. Smith*, 99 Nev. 806 (1983) is controlling authority on the jury trial issue in view of the legislative amendments to NRS 484.379 since the *Smith* decision in 1983?

B. Whether a federal constitutional right to trial by jury for misdemeanor DUI offenses should be recognized by this Court in light of the Federal District Court ruling by the Honorable Edward C. Reed in *Bronson v. Swinney*?

REASONS WHY WRIT SHOULD ISSUE

Petitioner is without any plain, speedy and adequate remedy other than certiorari to rectify the action by Respondent in remanding the case to Municipal Court and ruling NRS 266.550 unconstitutional. Specifically, NRS 34.020(3) mandates that the writ of certiorari be granted by the Supreme Court upon application of a municipality where a district court has passed upon the constitutionality or validity of a statute or municipal ordinance in a case prosecuted for the violation of such statute or ordinance.

In addition, NRS 34.020(2) requires the writ to be granted in all cases where an inferior tribunal during the exercise of judicial functions exceeds its jurisdiction and there is no appeal, nor any plain, speedy and adequate remedy. In this case the City of North Las Vegas is prohibited from taking a direct appeal to this Court by the terms of Article 6, Section 6 of the Nevada Constitution, which declares that district courts shall have final appellate jurisdiction in cases arising in inferior tribunals. Therefore, a writ of certiorari is the proper device by which Petitioner may have its grievance with Respondent remedied.

There is a split of authority among the various Departments of the Eighth Judicial District Court concerning the jury trial issue for misdemeanor DUI prosecutions. At least three other Departments, numbers VI, VII and VIII, have ruled opposite from Respondent on this issue and denied a jury trial request on appeal. A writ must issue from this Court so that it can hear and determine the legal issue in order for the conflict among the Departments of the Eighth Judicial District Court to be resolved. Moreover, there are currently pending several other cases before this Court regarding the same issue. To the extent it may be practical, Petitioner asks that its case be consolidated with those other matters.

POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

RESPONDENT EXCEEDED HIS JURISDICTIONAL AUTHORITY BY REVERSING THE MISDEMEANOR CONVICTION AND REMANDING THE CASE TO MUNICIPAL COURT FOR A JURY TRIAL

Upon conviction in a municipal court of this state, a defendant has the right to appeal to the district court. NRS 266.595, NRS 5.080 and NRS 189.010. Such appeal takes the form of a trial de novo. NRS 266.565. But see NRS 266.005 which renders Chapter 266 inapplicable to charter cities. This trial on the appeal is before the bench and without a jury. *State v. Smith*, 99 Nev.806 (1983). See also *Hudson v. City of Las Vegas*, 81 Nev. 677 (1965), *City of Las Vegas v. O'Donnell*, 100 Nev. 491 (1984) and NRS 266.550.

Once an appeal is taken from a misdemeanor conviction, there is no provision in statutory or case law for the district court hearing the appeal to reverse the judgment of the municipal court and remand the case for a new trial. Respondent herein acted without authority in so doing and thereby exceeded his jurisdiction. The proper procedure would have been for Respondent to enter his judgment based upon a trial de novo.

In *City of Las Vegas v. O'Donnell*, 100 Nev. 491 (1984), the district court remanded the misdemeanor appeal to the municipal court for a new trial and was held to have exceeded its jurisdiction by so doing. The City of Las Vegas petitioned the Nevada Supreme Court for a writ of certiorari, challenging the action of the district court.

"In the present petition, the City of Las Vegas seeks a determination by this court that the district court exceeded its jurisdiction in remanding the case to the municipal court rather than holding a trial de novo itself. The City also contends that the district court erred in determining that the evidence of intoxilyzer tests should be suppressed at trial. We agree with the City with respect to both contentions.

First, the district court was clearly without jurisdiction to remand the case to the municipal court for a trial de novo. The district court was instead required to hold a trial de novo to determine for itself the question of Furniss' guilt or innocence. See NRS 266.565, supra, note 1. Upon remand, *the district court shall conduct such a trial.*" (Emphasis added). *Id.*, at page 493.

Hence, Respondent had no jurisdiction to vacate the lower court judgment. Unlike a typical appellate court process, the district court does not sit in a reviewing court posture, determining whether any error of law was committed by the lower court. Rather, the district court on a misdemeanor appeal from a municipal court must conduct a trial de novo. This Court must reverse the order of remand by Respondent and direct that a trial de novo be conducted at the district court level on appeal.

II.

RESPONDENT EXCEEDED HIS AUTHORITY BY RULING THAT NRS 266.550 UNCONSTITUTIONALLY DENIES A RIGHT TO TRIAL BY JURY TO PERSONS ACCUSED OF MISDEMEANOR DUI OFFENSES

Respondent entered a two-step ruling which declared that: (1) there is a federal constitutional right to trial by jury for a misdemeanor DUI charge under NRS 484.379

based upon the recent federal district court decision in *Bronson v. Swinney*, CV-R-86130 ECR (October 1, 1986) from the District of Nevada, opinion by the Honorable Edward C. Reed; and (2) that a statute providing otherwise is unconstitutional. See Exhibit "A" attached hereto, page 2 of the Decision and Order, lines 4-21. Petitioner submits that Respondent was in error in distinguishing the opinion of this Court in *State v. Smith*, 99 Nev. 806 (1983), which holds to the contrary.

A. *The ruling in State v. Smith, supra, is controlling authority on the jury trial issue, even in light of the legislative amendments to NRS 484.379 since 1983.*

Respondent is required to follow the pronouncement of this Court in *State v. Smith, supra,* which is controlling authority upon Respondent on the DUI jury trial issue. The accused, Mark Fraley, is not entitled to a jury trial for a misdemeanor DUI offense where the maximum authorized penalty is six (6) months in jail or less. In *Smith, supra,* this Court stated:

"Persons are guaranteed the right to a jury trial by both art I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefor turns upon whether the offense charged is characterized as "serious" or "petty." See Duncan

v. Louisiana, 391 U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, S.Ct. 1996 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).

In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U.S. 506, 94 S. Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.

At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .

Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

The amendments to NRS 484.379 made in 1983 and 1985 did not change the maximum authorized penalty for a misdemeanor DUI conviction. Those amendments did change the *minimum* penalty. The 1983 Legislature changed the minimum penalty from a fine of $100 and mandatory counseling to a $200 fine, mandatory counseling and either 2 days in jail or 48 hours of community service for a first offense, and the person must wear distinctive garb to identify himself as a DUI offender if performing the latter. NRS 484.3792. The maximum penalty for either a first or second DUI remains at six months in jail and/or a $1,000 fine. NRS 484.3792. The 1983 Legislature also amended the driver's license revocation law by mandating a ninety day revocation for a first offense DUI conviction and one year for a second offense. NRS 483.460

The 1985 Legislature did not change any of the penalty provisions for a misdemeanor DUI. It did increase the maximum authorized penalty for a felony DUI from six years to twenty years. NRS 484.3795.

It is clear from the above analysis that the holding in *State v. Smith, supra,* remains viable even in light of the amendments to the DUI law since the time of that decision. Therefore, Respondent exceeded his authority in distinguishing that ruling as there is no right to a jury trial for a misdemeanor DUI.

B. *There is no federal constitutional right to trial by jury for misdemeanor DUI offenses.*

1. Decisions of federal courts are not automatically binding upon state courts.

The powers of the federal judiciary are specified in the Constitution of the United States and the statutes

enacted by the Congress of the United States. Article III, Section 1 of the Constitution states that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2 of Article II further illuminates the issue by noting that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

It is clear from the above language that inferior federal courts were intended to have judicial power only over specific cases and controversies involving federal issues. They are not authorized to decide abstract matters or to bind state courts except to the extent that a particular case or controversy arises from a state court. The United States Code has not given any additional powers to the federal courts and maintains this case or controversy limitation.

> 28 USC § 1331 - The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
>
> 28 USC § 3231 - The district courts of the United States shall have original jurisdiction, exclusive of the States, of all offenses against the laws of the United States.

Obviously the federal courts are limited in their jurisdiction to specific actions. This same limitation applies to the highest court in the land, the Supreme Court. In one of the earliest decisions of the Supreme Court, Article III of the Constitution was interpreted to preclude any court

in the United States federal system from acting in an advisory capacity or rendering decisions on general issues, rather than on a case by case basis involving actual controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). However, because the Supreme Court is the ultimate authority on federal questions and issues, its decisions, while not binding except in a particular case, are considered to be the most definitive statement of the law which was at issue in that case and therefore upon that specific federal question. (Most states also have provisions of their state constitutions or statutes which acknowledge the United States Supreme Court as the controlling authority in the interpretation of federal issues, see Article 1, Sec. 2. of the Nevada Constitution.)

While the reiteration of the above provisions of the Federal Constitution and Statutes may seem to be superfluous, it is important that they be recognized since they are the building blocks for the case law involving the authority of a federal court to bind a state court. Too often it is assumed that a federal court is directly superior to a state court, when in reality, the two systems are distinct and separate from each other; the federal system acts only as a method of checks and balances against improper activity by state courts. The dichotomy between the federal and state judicial systems is well recognized in the State of Nevada. In *Bargas v. Warden*, 87 Nev 30, 482 P.2d 317 (1971), the Supreme Court of the State of Nevada noted that:

> We are bound by the decisions of the United States Supreme Court (Nevada Constitution, Article 1, Sec. 2.). We are not bound by the decisions of the other federal courts, *Bargas* at 32.

Nevada is not alone in its view regarding the force and effect of federal decisions. In *People v. Luros*, 480 P.2d 633, 92 Cal. Rptr. 833 (1971), the Supreme Court of California in an *en banc* decision, rejected the interpretations of several federal courts noting that the federal courts were not "compelling authority" and citing to the California case most known for outlinging the division between federal and state courts, *In Re Whitehorn*, 1 Cal. 3rd 504, 462 P.2d 361 (1969).

Similarly, the Supreme Court of Idaho, in *State v. Harmon*, 685 P.2d 814 (1984) indicated that while it might give deference to federal district court opinions, it was in no way bound by them. Citing to the premiere federal case in this area, *United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. Ill.) *cert. den.* 402 U.S. 983 (1970), the Idaho Court noted that federal district court rulings do not bind state courts in unrelated cases.

Finally, in one of the most succinct statements of the law in this area, the Court of Criminal Appeals of Oklahoma, in *Dean v. Crisp*, 536 P.2d 961 (1975), stated that:

> . . . The federal courts have no jurisdiction except in those areas which are concerned with interpretation of the United States Constitution. The inferior federal courts exercise no appellate jurisdiction over state tribunals. Therefore, decisions from these federal courts are not conclusive on state courts. . . .The decisions of the Federal Circuit Court of Appeals in *Lamb*, supra, and *Radcliff*, supra, do not establish binding precedent on this Court until the issue is answered by the United States Supreme Court. The inferior federal courts exercise their power only on a case-to-case basis and can extend their power no further. *Dean* at 963.

Of course the Court in *Dean* also noted that federal case law is often persuasive and the Nevada Supreme Court has also so indicated in *Rahn v. Warden*, 498 P.2d 1344 (1972), where the Nevada High Court acquiesced in the decisions of the Ninth Circuit Court of Appeals.

In *Bronson v. Swinney, supra*, the authority relied upon by Appellant below, Mark Fraley, to support his argument for a jury trial, the Federal Court had before it a Writ of Habeas Corpus arising out of a conviction for DUI originating in the Justice's Court for Reno. The granting of the Writ and the Court's Order for a jury trial on remand are only binding upon the original Justice's Court, and only in that particular case. The federal order is not binding upon a municipal or district court in the instant situation. A court's holding is always limited to those issues which are necessary to decide the case. All other commentary is *dictum* and not precedent. Since Judge Reed's minor reference to municipal courts was not necessary to a resolution of the case, it would not be binding.

Given the above case law, it is clear that neither the North Las Vegas Municipal Court nor the District Court are bound by the *Bronson* decision. Moreover, the State of Nevada has not chosen to acquiesce to federal court rulings in this area and the Respondent should not have voluntarily taken notice of the *Bronson* ruling and granted Appellant's Motion.

2. First and second offense DUI violations are "petty offenses" under federal constitutional law and defendants are not entitled to trials by jury.

A review of the United States Constitution and Supreme Court case decisions is necessary for a complete

understanding of the issues involved with the DUI jury trial question. Article III, Section 2, paragraph 3 of the United States Constitution states that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . ."

This language was later supplemented by the Sixth Amendment which provides that:

> . . .
>
> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."

On its face, the Constitution would seem to impose the right of trial by jury in all federal criminal cases, bearing in mind that Article III deals only with the federal government and federal crimes. Despite this language, however, the Supreme Court of the United States, as the ultimate authority on the meaning of the Constitution, decided as early as 1888, in *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, that the language in the Constitution must be viewed in light of the times in which it was written. Thus the Supreme Court has consistently held that the right to a jury trial was never intended to apply to those crimes which were considered to be "petty offenses" at common law. The Court has on numerous occasions reiterated this distinction between "petty" and "serious" offenses and has extended the concept to statutory crimes. *Cheff v. Schackenberg*, 384 U.S. 373, 86 S.Ct. 1523 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660 (1937); *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826 (1904), *Natal v. Louisiana*, 139 U.S. 621, 11 S.Ct. 636 (1891).

In the landmark case of *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), when the Supreme Court held that by virtue of the Fourteenth Amendment, the Sixth Amendment right to trial by jury also applied to state criminal proceedings, the High Court again restated its position with regard to the limitations between "serious" and "petty" offenses.

> . . . It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not· . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," . . . of the crime in question.
>
> . . . So-called petty offenses were tried without juries both in England and in the Colonies and have always been exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established commonlaw practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. . . .In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass on the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial, or where the legislature has not addressed itself to the problem, themselves face the questions in the first instance . . .

> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra,* to refer to objective criteria, chiefly the existing laws and practices in the Nation.

The *Duncan* Court then went on to note that both at common law and in federal statutes, the dividing line between "petty" and "serious" offenses was a maximum jail sentence of six months. The Court also indicated, in Footnote 35, that with the exception of criminal contempt offenses, the relevant penalty to be considered was the possible maximum sentence which could be imposed not the actual sentence levied against the defendant.

Subsequent to *Duncan,* the Supreme Court has written several decisions which clarify the manner in which a crime is to be classified as "petty" or "serious" and stresses that the amount of jail time which could be imposed is to be considered the most important, almost exclusive, factor in making such a determination. The first of these cases is *Frank v. United States,* 395 U.S. 147, 89 S.Ct. 1503 (1969). *Frank* dealt with a criminal contempt charge arising out of the violation of an administrative ruling. The Court succinctly reviewed the steps a court should take in deciding whether or not a jury trial is warranted.

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective indications of the seriousness with which society regards the offense. . . .The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission.
>
> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed,

> is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense."

Frank also held that collateral consequences of a conviction, if contemplated within the definition of "petty" by the legislature, would not remove an offense from the "petty" category. Thus the Court in *Frank* rejected the claim that a three year sentence of probation made an otherwise "petty" offense a "serious" one for purposes of a jury trial and noted that:

> "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself."

The next major federal case dealing with jury trials is *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886 (1970). In *Baldwin,* the defendant was charged with a crime which was punishable by up to one year imprisonment and which by statute could not be tried by jury. It was in *Baldwin* that the Supreme Court established the outer limit for the dividing line between "petty" and "serious" crimes. Any offense which carried a penalty in excess of six months in jail would be "serious", those whose maximum jail time did not exceed six months would be "petty". The Court made no mention of other factors, such as the amount of the fine, except to briefly refer to the $500.00 fine limit contained in the federal definition of "petty" under 18 USC § 1. The majority of the opinion centers around the issue of imprisonment and the need for objective criteria to make a determination.

> ". . . This near-uniform judgment of the Nation [that any jail time over six months removes a crime from the 'petty' offense category] furnishes us with the only objective criterion by which a line could ever be

drawn-on the basis of the possible penalty alone-between offenses that are and that are not regarded as 'serious' for purposes of trial by jury.

Of necessity, the task of drawing a line 'requires attaching different consequences to events which, when they lie near the line, actually differ very little.' *Duncan*, supra, at 161, 20 L.Ed. 2d at 502. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced the appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercusions affecting his career and his reputation. Where the accused cannot possibly face more than six months's imprisonment, we have held that these disadvantages, onerous as they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications."

Baldwin clearly sets forth the type of "balancing" test the Supreme Court recommends in all cases involving the jury trial issue. However, lower courts and numerous attorneys have taken *Baldwin* out of context. For example, the national standards language of Baldwin has been referred to by Judge Reed in *Bronson* and by the Ninth Circuit in some opinions as supporting grounds for the granting of jury trials in DUI cases. *United States v. Craner*, 652 F.2d 461 (9th Cir. 1976). The reasoning stated is that since the majority of states do grant a defendant a jury trial for DUI offenses, then this is a reflection by the "nation" that the offense is a serious one. While many states do allow for jury trials in DUI cases, they also allow jury trials in most misdemeanor cases, that is most cases where the penalty does not exceed six months' in jail. Those states which still punish DUI by penalties

which do not exceed the six month standard still consider the offense as "petty." These states have not redefined "petty", instead they have simply determined that jury trials should be granted in all crimes, petty or not, either because their state constitutions require jury trials in all criminal matters and are broader in scope than the federal constitution, or because state legislatures have enacted statutes providing for jury trials in petty offense cases. Nationally, the standard for defining a "petty" offense still turns primarily around the maximum possible jail sentence and the six month rule. *Codispoti Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687 (1974); *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2687 (1974).

For some years after *Duncan*, the Supreme Court did not rule on the relationship of fines to "petty" offense. This changed with the rendering of the decision of the Court in *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975). The Court in *Muniz* noted that while the six month guideline had been taken in part from the statutory definition of a "petty offense" contained in 18 USC § 1(3) ($500.00 fine and/or six months imprisonment) this did not mean that any fine which exceeded $500.00 would automatically cast the offense into the serious category. *Muniz* involved a $10,000.00 fine which was imposed against a labor union in a contempt type proceeding. The High Court did not set any outside fine standard for jury puposes in *Muniz*, but it did indicate that fines are, to some extent, at the bottom of the considerations which are to be weighed.

> "It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but

it is quite another to suggest that, *regardless of the circumstances* a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining, the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsicaily different." (Emphasis added). *Muniz* at 477.

Based upon a reading of the Supreme Court cases cited above, the Petitioner submits that no federal grounds existed for Respondent to grant the Motion to Dismiss for lack of a jury trial. The fact that Nevada's statute requires mandatory, as opposed to discretionary, imposition of imprisonment is irrelevant, since the Supreme Court stated in *Duncan, supra,* that it is the potential, not the actual jail sentence which is important. The fact that the DUI statute contains provisions such as mandatory counseling and that a DUI conviction will result in collateral consequences (such as the loss of a driver's license or enhanced punishment on a second offense) is insufficient to mandate a jury trial. *Frank, supra,* contained an obvious statement of the High Court that regulatory provisions of sentencing, such as probation, do not take an offense out of the "petty" category if it is otherwise treated as a "petty" offense, that is, punishable by no more than six months in jail. As noted in *Baldwin, supra,* the fact that the conviction could result in serious consequences and repercussions does not control whether the crime is classified as "petty" or "serious." Finally, the mere fact that Nevada has chosen to impose a $1,000 fine, instead of a $500 fine, does not automatically remove the offense from the "petty" category, especially given the rulings of the Nevada Supreme Court in this area, specifically in *State v. Smith, supra.*

Considering the above analysis, it is difficult to agree with the reasoning of Judge Reed in *Bronson*. With all due respect to Judge Reed, the Petitioner submits that his opinion in *Bronson* presents an incomplete statement of the case law in this area and the rationale and policies set forth by the United States Supreme Court.

Judge Reed relied heavily upon two Ninth Circuit cases dealing with jury trial issues. *United States v. Craner,* 652 F.2d 461 (9th Cir. 1976) and *United States v. Sanchez-Meza,* 547 F.2d 461 (1976). The Petitioner's reading of both of these cases is that they represent attempts by the Ninth Circuit to expand the concept and scope of jury trials way beyond that established by the United States Supreme Court. The Petitioner does not agree with the reasoning of the Ninth Circuit in either case and argues that while the Ninth Circuit (absent an overriding ruling from the Supreme Court) can create a greater scope of jury trials in the federal courts under its appellate jurisdiction, its rulings are not binding upon the State of Nevada and are in direct contradiction with the case law established by the Supreme Court, which *is* binding upon Nevada. Moreover, both *Craner* and *Sanchez-Meza* concerned federal offenses taking place on federal land. Thus, interpretation of federal statutory law was involved, not state law.

Not every federal court agrees with *Craner*. In *United States v. Fletcher,* 505 F.Supp. 1053 (1981), the United States District Court for the Western District of Virginia not only summarily denied a request for a jury trial involving a DUI committed in a federal park, but also rejected the *Craner* and *Woods* concept of looking beyond

the authorized penalties. Indeed, the *Fletcher* Court specifically held that:

> . . . the revocation of the right to operate a vehicle upon the highways, . . . is not a part of the punishment provided by law to be fixed by a court or jury upon conviction of a crime. The revocation . . . follows as a consequence and effect of conviction for crime. *Fletcher* at 1054.

Another federal court has rejected the concept that courts should consider the treatment of the offense at common law or whether the offense is *malum in se*, again in direct conflict with *Craner*, *Woods* and *Sanchez-Meza*. The United States District Court for the District of Puerto Rico, in *Matoe v. Rodriquez*, 440 F. Supp. 673 (1976), firmly rejected the "nature of the offense" method of classifying crimes for purposes of jury trials. The Court gave great weight to the Supreme Court decision in *Frank, supra*, and stated that:

> . . . the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. It concluded that of the objective indicators, the most important is the severity of the sentence. In cases where the maximum penalty has been provided for in a statutory manner, the legislature has been said *to include within the penalty imposed a statement about the seriousness of the offense*. . . .
>
> . . . It is thus clear that the doctrine of *District of Columbia v. Colts*, supra, wherein the primary importance was given to the nature of the offense, is no longer applicable. *Matos* at 676, 677.

Even the Ninth Circuit has had occasion to backtrack with regard to its decision in *Craner*. In *United States v. Arbo*, 691 F.2d 862 (1982), the Ninth Circuit referred to its policy in *Craner*. In *Arbo*, the defendant was charged with a violation of both federal statute and a federal regulation. The Court noted that its decision in *Craner* was based on "extraordinary circumstances", that is the lack of legislative judgment because the offense arose from a federal regulation. But in *Arbo*, the Court said no extraordinary circumstances existed since the defendant was charged under a federal statute, which did show legislative judgment that the crime should be a petty offense and triable without a jury.

In addition to the *Arbo* decision, the Ninth Circuit has, in one other opinion, apparently recanted, at least in part, the doctrine in *Craner*. In *United States v. Jenkins*, 734 F.2d 1322 (1983), the Court found that the imposition of a two year probation period under the Youth Corrections Act did not create extraordinary circumstances warranting a jury trial; that this collateral consequence did not remove the offense from the petty category because it was punishable by not more than six months in jail. (*Jenkins* involved a simple assault.)

Given the detailed review of the case law contained in this Brief of the decisions of the United States Supreme Court, together with an in depth reading of the decisions of the Ninth Circuit, which are often ambiguous at best, it is evident that DUI offenders in the State of Nevada, and, more specifically, those charged in the Municipal Court of North Las Vegas, do not have a constitutional right to a trial by jury.

For the reasons heretofore stated, the Petitioner requests that the Court reverse the decision and order of

Respondent and remand the case to the Eighth Judicial District Court for a trial de novo without a jury.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

APPELLANT'S OPENING BRIEF

(Filed June 22, 1987)

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I

STATEMENT OF THE CASE AND RELEVANT FACTS

On or about July 18, 1986, Defendant/Appellant MELVIN BLANTON was arrested by an officer of the North Las Vegas Police Department for driving under the influence of intoxicating liquor (N.R.S. 484.379), and so charged in a "first offense" criminal complaint on or about July 18, 1986.

On or about October 3, 1986, Defendant, by and through counsel, filed a Demand for Jury Trial, which Demand was orally denied by the Honorable Gary Davis, Judge of the Municipal Court, North Las Vegas, Nevada.

A Petition for Writ of Mandamus asserting Defendant's right to a jury trial in a first offense DUI prosecution was filed in the Eighth Judicial District Court on November 3, 1986, the Honorable Michael Wendell. The Petition was exclusively based upon federal law and the decision rendered by Federal District Judge Edward Reed in *Bronson v. Swinney*, on September 26, 1986, granting a jury trial to Petitioner Bronson in that case. Judge Wendell denied Defendant's Petition for Writ of Mandamus in a formal Order of January 14, 1987, from which Defendant filed a Notice of Appeal to this Court on January 20, 1987.

II

ISSUE

Whether the United States or Nevada Constitutions Require a Jury Trial, Upon Demand, for a Defendant Charged With First Offense Driving Under the Influence of Intoxicating Liquor, a Misdemeanor, in a

Municipal Court, Notwithstanding the Statutory Mandate of N.R.S. 266.550 Requiring a Trial to the Bench in All Misdemeanor Municipal Court Trials.

III

LEGAL MEMORANDUM

A.

A Jury Trial in a DUI Prosecution is Required Upon Demand in Municipal Court Pursuant to the United States and Nevada Constitutions

N.R.S. 266.550 states:

> Powers and jurisdiction of court same as justice's court; trial summary and without jury.
>
> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justices' courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature; but the trial and proceedings in such cases shall be summary and without a jury. (1907, p.265; RL 1912, Sec. 832; CL 1929, Sec. 1167.)

The Nevada Constitution, Article 1, Section 3, states:

> Sec: 3. Trial by jury; waiver in civil cases.
>
> The right of trial by Jury shall be secured to all and remain inviolate forever; but a Jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law; and in civil cases, if three fourths of the Jurors agree upon a verdict it shall stand and have the same force and effect as a verdict by the whole Jury, Provided, the Legislature by a law passed by a two thirds vote of all the members elected to each branch thereof may require a unanimous verdict notwithstanding this Provision.

The Nevada Constitution, Article 1, Section 8 states:

Section 8. Rights of accused in criminal prosecutions; jeopardy; due process of law; eminent domain.

No person shall be tried for a capital or other infamous crime (except in cases of impeachment, and in cases of the militia when in actual service and the land and naval forces in time of war, or which this state may keep, with the consent of congress, in time of peace, and in cases of petit larceny, under the regulation of the legislature) except on presentment or indictment of the grand jury, or upon information duly filed by a district attorney, or attorney general of the state, and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions. No person shall be subject to be twice put in jeopardy for the same offense; nor shall he be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made.

The Sixth Amendment to the United States Constitution states:

AMENDMENT VI

[Rights of Accused in Criminal Prosecutions]

Rights of accused in criminal prosecutions.

In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of

the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Supreme Court in *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), held that "crimes carrying possible penalties up to six months in custody do not require a jury trial if they otherwise qualify as petty offenses." Duncan, 88 S.Ct. 1453.

The Court further found at 88 S.Ct. 1453, that:

> . . . the penalty authorized for a particular crime has major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment . . .

Duncan itself instructed that a national standard be utilized to determine whether a jury trial is required upon demand for certain offenses. 391 U.S. 161, 88 S.Ct. 1453. Exhibit "A" attached hereto shows that forty-seven (47) States allow Jury Trials in DUI cases specifically or in misdemeanor cases in general. See *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

There are several important ramifications involved in a first conviction of misdemeanor D.U.I. in the State of Nevada:

> 1. Defendant must choose between two (2) days imprisonment or perform forty-eight (48) hours of work for the community which computes to six (6) days at eight (8) hours per day. N.R.S. 484.3792(1)(a)(2).

2. Defendant must wear "distinctive garb" while performing this community service, which garb must identify him as a violator of the DUI laws.

3. A mandatory minimum fine of $200.00 but not more than $1,000.00. N.R.S. 484.3792(1)(a)(3).

4. Defendant must complete at his own expense, usually $175.00 or greater, an educational course on the abuse of alcohol and controlled substances approved by the Department of Motor Vehicles, and complete the course within the time specified in the Order of the Court. N.R.S. 484.3792(1)(a)(1).

5. Suffer a mandatory ninety (90) day suspension of his driver's license. N.R.S. 484.460(1)(c).

6. Suffer almost certain insurance premium increases, and the

7. Social stigma of being a convicted "drunk driver".

The criminal charge of D.U.I. is a misdemeanor which carries a maximum period of incarceration of six (6) months in the local County Jail and a maximum fine of $1,000.00. N.R.S. 484.3792.

Upon a second conviction of D.U.I. within seven (7) years, a defendant must be sentenced to a mandatory minimum period of ten (10) days incarceration, and a fine of not less than $500.00. N.R.S. 484.3792(1)(b). Upon a third charge of D.U.I. within seven (7) years, the charge becomes a felony punishable by imprisonment for not less than one (1) year nor more than six (6) years, in a minimum security institution, honor camp, restitution center, or similar facility, and defendant must be fined not less than $2,000.00 nor more than $5,000.00. N.R.S. 484.3792(c).

Equally important is that no D.U.I. charge is dismissable or negotiable by the prosecuting authorities "unless (the prosecuting attorney) knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial." N.R.S. 484.3792(3).

Again, the United States Supreme Court, in *Duncan, supra,* stated that a national standard be utilized in determining whether a Jury Trial is mandated for a particular offense, at 88 S.Ct. 1453:

> In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937), supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation. In the federal system, petty offenses are defined as those punishable by no more than six months in prison and a $500.00 fine. . . . (Emphasis and parenthetical material added.)

See also, *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), wherein the Court reviewed legislative reenactments of the death penalty in one form or another after *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), in these words, at 96 S.Ct. 2928:

> The most marked indication of society's endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the

> Court in Furman primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

The national standards reflected in the allowance of Jury Trials for D.U.I. charges in forty-seven (47) States clearly mandate a Sixth and Fourteenth Amendment requirement that a Jury Trial be allowed, at a defendant's request, in a D.U.I. trial. The draconian consequences attendant to such a conviction, in their own right, lend strength to the imposition of a jury between the accused and the force of the State or prosecuting attorney.

B.

The Federal District Court for the District of Nevada Has Ruled That As A Matter of Federal Constitutional Law, A Defendant Charged With Driving Under the Influence of Intoxicating Liquor Has the Right to A Jury Trial

This Court is referred to the well-reasoned decision of Judge Edward Reed, attached hereto as Exhibit "B", in the case of *Bronson v. Swinney*, CV-R-86-130-ECR, filed October 1, 1986, in the United States District Court for the District of Nevada. Without reiterating the law in that decision in the opening brief proper, the law and reasoning of that decision is urged upon this Court. The *Bronson* case is now stuck in the Ninth Circuit awaiting a current ruling by this Court on this issue, since Bronson's attorney neglected to exhaust his State remedies before galloping into the federal system.

See also *United States v. Craner*, 652 F.2d 23 (CA9 1981), allowing jury trials for first-time DUI offenders in federal court.

C.

The United States Court of Appeals for the Ninth Circuit Has Ruled In a State Case That A Potential Fine of $1,000.00 Triggers the Right To A Jury Trial

In *Rife v. Godbehere*, 814 F.2d 563, 565 (CA9 1987), the Ninth Circuit ruled that an Arizona State Defendant charged with a Class I misdemeanor punishable by a fine of up to $1,000.00 was entitled to a jury trial. The Court followed the rule in *United States v. Hamdan*, 552 F.2d 276 (CA9 1977) which granted a jury trial on a federal charge of the making of false statements in documents filed with the Immigration and Naturalization Service, where a potential fine of $1,000.00 existed. *Rife* extends this rule to a State offense punishable by a potential fine of $1,000.00. Inasmuch as a first-offense D.U.I. charge carries a potential fine of $1,000.00, a jury trial is required on this separate legal basis and case.

IV

CONCLUSION

N.R.S. 266.550 cannot withstand the tide of federal constitutional law cited above. This Court is not asked to hold the statute unconstitutional for all purposes (misdemeanor crimes), as the *Rife* case might strongly suggest; but this Court is urged to construe N.R.S. 266.500 inapplicable to DUI offenses pursuant to the federal and state constitutional provisions enumerated above. This would

allow Defendant BLANTON his jury trial in North Las Vegas Municipal Court.

DATED this 19th day of June, 1987.

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IN THE SUPREME COURT OF THE STATE OF NEVADA

• • • • • •

CITY OF NORTH LAS VEGAS, NEVADA, Petitioner, vs. ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondent.	)	Case No. 18065

ANSWER TO PETITION FOR
A WRIT OF CERTIORARI

(Filed July 1, 1987)

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A. INDIVIDUALS CHARGED WITH VIOLATING NRS 484.379 SUBSEQUENT TO JULY 1, 1983 ARE CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY AS THE OFFENSE IS "SERIOUS" AS OPPOSED TO "PETTY"

B. SINCE AN INDIVIDUAL HAS A RIGHT TO A JURY TRIAL FOR NRS 484.379 VIOLATIONS, NRS 266.550 IS UNCONSTITUTIONAL

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IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * *

CITY OF NORTH LAS VEGAS, NEVADA, Petitioner,	)	Case No. 18065
vs.	)	
ADDELIAR D. GUY, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, Respondent.	)	

ANSWER TO PETITION FOR A WRIT OF CERTIORARI

FACTS

Defendant, MARK D. FRALEY, was arrested for "Driving under the influence of intoxicating liquor" hereinafter referred as D.U.I. and was scheduled for trial in the North Las Vegas Municipal Court. Fraley file a written demand for trial by jury. The municipal judge denied the request and subsequently convicted Defendant of the D.U.I. charge. An appeal was filed in the Eight Judicial District Court.

One issue raised on appeal was the denial of the right to be tried by jury. The Honorable Addeliar D. Guy considered briefs and arguments of the respective parties and held that all defendants charged with D.U.I.'s subsequent to July 1, 1983 are constitutionally entitled to a trial by jury if desired. He further ruled that NRS 266.550 in so far as it prevents or denies jury trials in municipal courts, is unconstitutional. Counsel for the City of North Las

Vegas filed a Petition for Writ of Certiorari in this Court. Two issues arise from these facts (1) Are individuals charged with D.U.I. offenses under NRS 484.379 entitled constitutionally to a jury trial? and (2) Is NRS 266.550 unconstitutional? If the answer to the former is negative then the second issue becomes moot. On the other hand if jury trials are constitutionally guaranteed the second issue is alive and must be considered accordingly.

ISSUES

I.

ARE INDIVIDUALS CHARGED WITH VIOLATING OFFENSES UNDER NRS 484.379 CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY?

II.

IS NRS 266.550 UNCONSTITUTIONAL?

ARGUMENT

A.

INDIVIDUALS CHARGED WITH VIOLATING NRS 484.379 SUBSEQUENT TO JULY 1, 1983 ARE CONSTITUTIONALLY GUARANTEED A TRIAL BY JURY AS THE OFFENSE IS "SERIOUS" AS OPPOSED TO "PETTY"

Individuals within Nevada's boundaries are constitutionally guaranteed trial by jury. The Nevada Constitution, Article I, Section 3 mandates,

> "The right of trial by jury shall be secured *to all* and remain inviolate forever . . . " (Emphasis Added)

Federal protection is also afforded the public. The Sixth Amendment of the United States Constitution holds,

> "*In all criminal prosecutions*, the accused shall enjoy the right to a speedy trial, *by an impartial jury* of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . " (Emphasis Added).

This right to a jury trial is a fundamental one and is applicable to State proceedings through the 14th Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed. 2d 491, 88 S. Ct. 1444 (1968). It is well settled however that not all offenses require or trigger a trial by jury but rather only those which are "serious" as opposed to "petty". (It is worthy to note that even though an offense may be considered "petty" under the United States Constitution, the State constitution may require that it be deemed "serious" and guarantee a jury trial. A State is free to afford its citizens more rights than guaranteed by the federal constitution. However, it is this writer's position that under either constitution, a jury trial is guaranteed for NRS 484.379 violation). Characterizing a particular offense as either "serious" or "petty" is not automatic but rather requires considering a number of issues and factors. This was done in a well reasoned decision by Judge Reed in *Bronson v. Swinney*, CV-R-86-130 ECR (10-1-86) which should be adopted by this Court. C.f. *State v. Smith*, 99 Adv. Op. 172 (1983) (*State v. Smith*, is inapplicable for now jail time is mandatory unlike the situation and state of the law at the time of *State v. Smith*, supra.) in addition to several other collateral consequences arising from a conviction. No one can honestly say that Nevada does not consider D.U.I.'s to be serious. A mere reading of this Court's opinions on D.U.I. related issues dispells

anything to the contrary. Such a strong position is warranted as "drinks are dangerous when they drive". However, it would be more dangerous if the government were allowed to take away a valuable right from its citizens. Under the circumstances that now exist, both the United States and Nevada Constitutions guarantee a trial by jury for offenses under NRS 484.379

B.

SINCE AN INDIVIDUAL HAS A RIGHT TO A JURY TRIAL FOR NRS 484.379 VIOLATIONS, NRS 266.550 IS UNCONSTITUTIONAL

Municipal courts are unconstitutionally authorized and created by the legislature. See Article 6, Section 1 of the Nevada Constitution. It is important to note that once municipal courts are established, they exist as a coequal branch of local government and are part of the constitutional judicial system of this state. See *City of North Las Vegas ex rel. Arndt v. Daines*, 92 Nev. 292, 550 P. 2d 399 (1976). The legislature is empowered to fix by law the jurisdiction of the municipal courts. See Article 6, Section 9 of the Nevada Constitution. NRS 266.555 sets the municipal courts' jurisdiction which includes D.U.I. cases. It is well settled that municipal courts once created are part of the constitutional judicial system. Equally true, the executive and/or legislative branches of state government may not exercise or restraint the judicial power. See *State ex rel. Watson v. Merialdo*, 70 Nev. 322, 268 P. 2d 922 (1954). Forbidding jury trials in municipal court amounts to the legislative branch undertaking the role of judicial power. This they cannot do. Therefore, NRS 266.550 is unconstitutional as to D.U.I. cases.

Respectfully submitted,

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CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the above and foregoing ANSWER TO PETITION FOR WRIT OF CERTIORARI was deposited in the mail at Las Vegas, Nevada on this 30th day of June, 1987 addresses as follows: MARK L. ZALAORAS, Deputy City attorney, City of North Las Vegas, 2200 Civic Center Dr., North Las Vegas, Nevada 89030.

/s/ Barbara Watkins
An employee of JOHN G. WATKINS, ESQ.

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

RESPONDENT'S ANSWERING BRIEF

(Filed July 24, 1987)

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III.

ISSUE

WHETHER A PERSON CHARGED WITH A MISDEMEANOR DUI OFFENSE HAS A CONSTITUTIONAL RIGHT TO A TRIAL BY JURY IN VIEW OF LEGISLATIVE AMENDMENTS TO THE DUI LAW SINCE THE RULING IN *STATE V. SMITH* AND IN LIGHT OF THE RULING BY THE FEDERAL DISTRICT COURT OF NEVADA IN *BRONSON V. SWINNEY*?

IV.

STATEMENT OF THE CASE

The City of North Las Vegas adopts Blanton's version of the facts as stated in his Statement of the Case and Relevant Facts on page 1 of his "Appellant's Opening Brief", with the addition of the following facts, which were omitted by Blanton.

The City of North Las Vegas filed a Motion to Strike Demand for Jury Trial in the Municipal Court of North Las Vegas on or about October 9, 1986. At the same time Blanton's Demand for Jury Trial was denied by the Municipal Court, the City's Motion to Strike Demand for Jury Trial was granted. The Municipal Court stayed proceedings pending determination of the Petition for a Writ of Mandamus in the District Court.

V.

ARGUMENT

A.

THE RULING IN STATE v. SMITH IS CONTROLLING AUTHORITY ON THE JURY TRIAL ISSUE, EVEN IN LIGHT OF THE LEGISLATIVE AMENDMENTS TO NRS 484.379 SINCE 1983.

The pronouncement of this Court in *State v. Smith*, 99 Nev. 806 (1983) is controlling authority on the DUI jury trial issue. The accused, Melvin Blanton, is not entitled to a jury trial for a misdemeanor DUI offense where the maximum authorized penalty is six (6) months in jail or less. In *Smith, supra*, this Court stated:

> "Persons are guaranteed the right to a jury trial by both art I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution. Despite apparently significant differences in the language of these constitutional provisions, both provisions have been interpreted to guarantee the right to a jury trial in a criminal matter only as it existed at common law. Thus, there is no constitutional right to trial by jury for "petty" offenses. See Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444 (1968); State v. Ruthe, 24 Nev. 251, 52 P. 274 (1898). Whether there is a constitutional right to a trial by jury therefor turns upon whether the offense charged

> is characterized as "serious" or "petty." See Duncan v. Louisiana, 391, U.S. at 159. In turn, the principal criterion used in characterizing an offense as "petty" or "serious" is the severity of the maximum authorized penalty. See Baldwin v. New York, 399 U.S. 66, S.Ct. 1996 (1969); Bloom v. Illinois, 391 U.S. 194, 211, 88 S.Ct. 1477 (1968).
>
> In recent decisions, the United States Supreme Court has increasingly relied upon the objective criterion of the maximum possible penalty in deciding whether to characterize an offense as "petty" or "serious". See Taylor v. Hayes, 418 U.S. 488, 94 S.Ct. 2697 (1974); Codispoti v. Pennsylvania, 418 U. S. 506, 94 S.Ct. 2687. Using this criterion, the Court has held that where the maximum possible penalty is six months imprisonment or less, the offense is "petty," and the right to trial by jury does not attach. See Codispoti v. Pennsylvania, 418 U.S. at 512.
>
> At the time of the alleged offense, the maximum punishment for a first-time DUI conviction in Nevada under NRS 484.379 was six months imprisonment or a fine of up to $1,000.00. As the potential maximum term of imprisonment is six months, it would appear that respondent Smith's offense was "petty" within the Supreme Court's definition, and that there is thus no constitutional right to trial by jury in his DUI prosecution. . . .
>
> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. The district court thus erred in granting the writ of mandamus to compel the justice's court to grant respondent a jury trial in his pending DUI prosecution." Id. at page 809-810.

The amendments to NRS 484.379 made in 1983 and 1985 did not change the maximum authorized penalty for a misdemeanor DUI conviction. Those amendments did change the *minimum* penalty. The 1983 Legislature changed the minimum penalty from a fine of $100 and mandatory counseling to a $200 fine, mandatory counseling and either 2 days in jail or 48 hours of community service for a first offense, and the person must wear distinctive garb to identify himself as a DUI offender if performing the latter. NRS 484.3792. The maximum penalty for either a first or second DUI remains at six months in jail and/or a $1,000 fine. NRS 484.3792. The 1983 Legislature also amended the driver's license revocation law by mandating a ninety day revocation for a first offense DUI conviction and one year for a second offense. NRS 483.460.

The 1985 Legislature did not change any of the penalty provisions for a misdemeanor DUI. It did increase the maximum authorized penalty for a felony DUI from six years to twenty years. NRS 484.3795.

It is clear from the above analysis that the holding in *State v. Smith, supra,* remains viable even in light of the amendments to the DUI law since the time of that decision. Therefore, there is no right to a jury trial for a misdemeanor DUI, as that offense must still be classified as "petty".

B.

THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO TRIAL BY JURY FOR MISDEMEANOR DUI OFFENSES.

1. Decisions of federal courts are not automatically binding upon state courts.

The powers of the federal judiciary are specified in the Constitution of the United States and the statutes enacted by the Congress of the United States. Article III, Section 1 of the Constitution states that:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Section 2 of Article II further illuminates the issue by noting that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; . . .

It is clear from the above language that inferior federal courts were intended to have judicial power only over specific cases and controversies involving federal issues. They are not authorized to decide abstract matters or to bind state courts except to the extent that a particular case or controversy arises from a state court. The United States Code has not given any additional powers to the federal courts and maintains this case or controvery limitation.

> 28 USC § 1331 – The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States.
>
> 28 USC § 3231 – The district courts of the United States shall have original jurisdiction, exclusive of the States, of all offenses against the laws of the United States.

Obviously the federal courts are limited in their jurisdiction to specific actions. The same limitation applies to the highest court in the land, the Supreme Court. In one of the earliest decisions of the Supreme Court, Article III of the Constitution was interpreted to preclude any court in the United States federal system from acting in an advisory capacity or rendering decision on general issues, rather than on a case by case basis involving actual controversies. *Marbury v. Madison*, 5 U.S. 137, 1 Cranch 137 (1803). However, because the Supreme Court is the ultimate authority on federal questions and issues, its decisions, while not binding except in a particular case, are considered to be the most definitive statement of the law which was at issue in that case and therefore upon that specific federal question. (Most states also have provisions of their state constitutions or statutes which acknowledge the United States Supreme Court as the controlling authority in the interpretation of federal issues, see Article I, Sec. 2. of the Nevada Constitution.)

While the reiteration of the above provisions of the Federal Constitution and Statutes may seem to be superfluous, it is important that they be recognized since they are the building blocks for the case law involving the authority of a federal court to bind a state court. Too often it is assumed that a federal court is directly superior to a state court, when in reality, the two systems are distinct and separate from each other; the federal system acts only as a method of checks and balances against improper activity by state courts. The dichotomy between the federal and state judicial systems is well recognized in the State of Nevada. In *Bargas v. Warden*, 87 Nev 30, 482

P.2d 317 (1971), the Supreme Court of the State of Nevada noted that:

> We are bound by the decisions of the United States Supreme Court (Nevada Constitution, Article 1, Sec. 2.). We are not bound by the decisions of the other federal courts, *Bargas* at 32.

Nevada is not alone in its view regarding the force and effect of federal decisions. In *People v. Luros*, 480 P.2d, 633, 92 Cal Rptr. 833 (1971), the Supreme Court of California in an *en banc* decision, rejected the interpretations of several federal courts noting that the federal courts were not "compelling authority" and citing to the California case most known for outlining the division between federal and state courts, *In Re Whitehorn*, 1 Cal. 3rd 504, 462 P.2d 361 (1969).

Similarly, the Supreme Court of Idaho, in *State v. Harmon*, 685 P.2d 814 (1984) indicated that while it might give deference to federal district court opinions, it was in no way bound by them. Citing the premiere federal case in this area, *United States ex. rel. Lawrence v. Woods*, 432 F.2d 1072 (7th Cir. Ill.) *cert. den.* 402 U.S. 983 (1970),the Idaho Court noted that federal district court rulings do not bind state courts in unrelated cases.

Finally, in one of the most succinct statements of the law in this area, the Court of Criminal Appeals of Oklahoma, in *Dean v. Crisp*, 536 P.2d 961 (1975), stated that:

> . . . The federal courts have no jurisdiction except in those areas which are concerned with interpretation of the United States Constitution. The inferior federal courts exercise no appellate jurisdiction over state tribunals. Therefore, decisions from these federal courts are not conclusive on state courts. . . . The

> decisions of the Federal Circuit Court of Appeals in *Lamb*, supra, and *Radcliff*, supra, do not establish binding precedent on this Court until the issue is answered by the United States Supreme Court. The inferior federal courts exercise their power only on a case-to-case basis and can extend their power no further. *Dean* at 963.

Of course the Court in *Dean* also noted that federal case law is often persuasive and the Nevada Supreme Court has also so indicated in *Rahn v. Warden*, 498 P.2d 1344 (1972), where the Nevada High Court acquiesced in decisions of the Ninth Circuit Court of Appeals.

In *Bronson v. Swinney*, 648 F.Supp. 1094 (D.Nev. 1986) the authority relied upon by Blanton to support his argument for a jury trial, the Federal Court had before it a Writ of Habeas Corpus arising out of a conviction for DUI originating in the Justice's Court for Reno. The granting of the Writ and the Court's Order for a jury trial on remand are only binding upon the original Justice's Court, and only in that particular case. The federal order is not binding upon a municipal or district court in the instant situation. A court's holding is always limited to those issues which are necessary to decide the case. All other commentary is dictum and not precedent. Since Judge Reed's minor reference to municipal court was not necessary to a resolution of the case, it would not be binding.

Given the above case law, it is clear that neither the North Las Vegas Municipal Court nor the District Court are bound by the Bronson decision. Moveover, the State of Nevada has not chosen to acquiesce to federal court rulings in this area and the District Court correctly chose

not to have taken notice of the *Bronson* ruling and denied Blanton's Petition.

2. First and second offense DUI violations are "petty offenses" under federal constitutional law and defendants are not entitled to trials by jury.

A review of the United States Constitution and Supreme Court case decisions is necessary for a complete understanding of the issues involved with the DUI jury trial question. Article III, Section 2, paragraph 3 of the United States Constitution states that:

> "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . "

This language was later supplemented by the Sixth Amendment which provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

On its face, the Constitution would seem to impose the right of trial by jury in all federal criminal cases, bearing in mind that Article III deals only with the federal government and federal crimes. Despite this language, however, the Supreme Court of the United States, as the ultimate authority on the meaning of the Constitution, decided as early as 1888, in *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, that the language in the Constitution must be viewed in light of the times in which it was written. Thus the Supreme Court has consistantly hold that the right to a jury trial was never intended to apply to those crimes which were considered to be "petty offenses" at common law. The Court has on numerous occasions reitereated this distinction between "petty" and

"serious" offenses and has extended the concept to statutory crimes. *Cheff v. Schackenberg*, 384, U.S. 373, 86 S.Ct. 1523 (1966); *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660 (1937); *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826 (1904), *Natal v. Louisiana*, 139 U.S. 621, 11 S.Ct. 636 (1891).

In the landmark case of *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444 (1968), when the Supreme Court held that by virtue of the Fourteenth Amendment, the Sixth Amendment right to trial by jury also applied to state criminal proceedings, the High Court again restated its position with regard to the limitations between "serious" and "petty" offenses.

> . . . It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments," . . . of the crime in question.
>
> . . . So-called petty offenses were tried without juries both in England and in the Colonies and have always been exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established commonlaw practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury adjudications. . . . In the absence of an explicit constitutional provision,

> the definitional task necessarily falls on the courts, which must either pass on the validity of the legislative attempts to identify those petty offenses which are exempt from jury trial, or where the legislature has not addressed itself to the problem, themselves face the questions in the first instance . . .
>
> In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, to refer to objective criteria, chiefly the laws and practices in the Nation. 88 S.Ct. at 1453.

The *Duncan* Court then went on to note that both at common law and in federal statutes, the dividing line between "petty" and "serious" offenses was a maximum jail sentence of six months. The Court also indicated, in Footnote 35, that with the exception of criminal contempt offenses, the relevant penalty to be considered was the possible maximum sentence which could be imposed, not the actual sentence levied against the defendant.

Subsequent to *Duncan*, the Supreme Court has written several decisions which clarify the manner in which a crime is to be classified as "petty" or "serious" and stresses that the amount of jail time which could be imposed is to be considered the most important, almost exclusive, factor in making such a determination. The first of these cases is *Frank v. United States*, 395 U.S. 147, 89 S.Ct. 1503 (1969). *Frank* dealt with a criminal contempt charge arising out of the violation of an administrative ruling. The Court succinctly reviewed the steps a court should take in deciding whether or not a jury trial is warranted.

> "In determining whether a particular offense can be classified as 'petty,' this Court has sought objective

> indications of the seriousness with which society regards the offense. . . .The most relevent indication of the seriousness of an offense is the severity of the penalty authorized for its commission.
>
> In the ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense." *Frank*. at 89 S.Ct. at 1505.

Frank also held that collateral consequences of a conviction, if contemplated within the definition of "petty" by the legislature, would not remove an offense from the "petty" category. Thus the Court in *Frank* rejected the claim that a three year sentence of probation made an otherwise "petty" offense a "serious" one for purpose of a jury trial and noted that:

> "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself." *Frank*, 89 S.Ct. at 1506.

The next major federal case dealing with jury trials is *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886 (1970). In *Baldwin*, the defendant was charged with a crime which was punishable by up to one year imprisonment and which by statute could not be tried by jury. It was in *Baldwin* that the Supreme Court established the outer limit for the dividing line between "petty" and "serious" crimes. Any offense which carried a penalty in excess of six months in jail would be "serious", those whose maximum jail time did not exceed six months would be "petty". The Court made no mention of other factors, such as the amount of the fine, except to briefly refer to the $500.00 fine limit contained in the federal definition

of "petty" under 18 USC § 1. The majority of the opinion centers around the issue of imprisonment and the need for objective criteria to make a determination.

> " . . . This near-uniform judgment of the Nation [that any jail time over six months removes a crime from the 'petty' offense category] furnishes us with the only objective criterion by which a line could ever be drawn-on the basis of the possible penalty alone-between offenses that are and that are not regarded as 'serious' for purposes of trial by jury.
>
> Of necessity, the task of drawing a line 'requires attaching different consequences to events which, when they lie near the line, actually differ very little.' *Duncan*, supra, at 161, 20 L.Ed.2d at 502. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face him, and the consequences that faced the appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercusions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous as they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications." *Baldwin*, 90 S.Ct. at 1890.

Baldwin clearly sets forth the type of "balancing" test the Supreme Court recommends in all cases involving the jury trial issue. However, lower courts and numerous attorneys have taken *Baldwin* out of context. For example, the national standards language of Baldwin has been referred to by Judge Reed in *Bronson* and by the Ninth Circuit in some opinions as supporting grounds for the granting of jury trials in DUI cases. *United States v.*

Craner, 652 F.2d 461 (9th Cir. 1976). The reasoning stated is that since the majority of states do grant a defendant a jury trial for DUI offenses, then this is a reflection by the "nation" that the offense is a serious one. While many states do allow for jury trials in DUI cases, they also allow jury trials in most misdemeanor cases, that is most cases where the penalty does not exceed six months' in jail. Those states which still punish DUI by penalties which do not exceed the six month standard still consider the offense as "petty." These states have not redefined "petty", instead they have simply determined that jury trials should be granted in all crimes, petty or not, either because their state constitutions require jury trials in all criminal matters and are broader in scope than the federal constitution, or because state legislatures have enacted statutes providing for jury trials in petty offense cases. Nationally, the standard for defining a "petty" offense still turns primarily around the maximum possible jail sentence and the six month rule. *Codispoti v. Pennsylvania*, 418 U.S. 506, 94 S.Ct. 2687 (1974); *Taylor v. Hayes*, 418 U.S. 488, 94 S.Ct. 2687 (1974).

For some years after *Duncan*, the Supreme Court did not rule on the relationship of fines to "petty" offense. This changed with the rendering of the decision of the Court in *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178 (1975). The Court in *Muniz* noted that while the six month guideline had been taken in part from the statutory definition of a "petty offense" contained in 18 USC § 1(3) ($500.00 fine and/or six months imprisonment) this did not mean that any fine which exceeded $500.00 would automatically cast the offense into the serious category. *Muniz* involved a $10,000.00 fine which was

imposed against a labor union in a contempt type proceeding. The High Court did not set any outside fine standard for jury purposes in *Muniz*, but it did indicate that fines are, to some extent, at the bottom of the considerations which are to be weighed.

> "It is one thing to hold that deprivation of an individual's liberty beyond a six month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, *regardless of the circumstances* a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different." (Emphasis added). *Muniz* at 477.

Blanton cites *Rife v. Godbehere*, 814 F.2d 563 (C.A. 1987) where the Ninth Circuit held that the defendant was entitled to a jury trial on the basis alone that he was subject to a $1,000 fine pursuant to a charge brought under an Arizona statute. The reasoning to support this decision is weak in view of the *Muniz* decision. It is also unrealistic in the sense of the economics of our times; a $500 fine had much greater impact twenty years ago on an individual defendant than a $1,000 fine would today.

Based upon a reading of the Supreme Court cases cited above, the City submits that no federal grounds exist for this Court to grant jury trials for DUI defendants. The fact that Nevada's statute requires mandatory, as opposed to discretionary, imposition of imprisonment is irrelevant, since the Supreme Court stated in *Duncan, supra*, that it is the potential, not the actual jail sentence which is important. The fact that the DUI statute contains provisions such as mandatory counseling and that a DUI

conviction will result in collateral consequences (such as the loss of a driver's license or enhanced punishment on a second offense) is insufficient to mandate a jury trial. *Frank, supra*, contained an obvious statement of the High Court that regulatory provisions of sentencing, such as probation, do not take an offense out of the "petty" category if it is otherwise treated as a "petty" offense, that is, punishable by no more than six months in jail. As noted in *Baldwin, supra*, the fact that the conviction could result in serious consequences and repercussions does not control whether the crime is classified as "petty" or "serious." Finally, the mere fact that Nevada has chosen to impose a $1,000 fine, instead of a $500 fine, does not automatically remove the offense from the "petty" category, especially given the rulings of the Nevada Supreme Court in this area, specifically in *State v. Smith*, supra.

Considering the above analysis, it is difficult to agree with the reasoning of Judge Reed in *Bronson*. With all due respect to Judge Reed, the City submits that his opinion in *Bronson* presents an incomplete statement of the case law in this area and the rationale and policies set forth by the United States Supreme Court.

Judge Reed relied heavily upon two Ninth Circuit cases dealing with jury trial issues. *United States v. Craner*, 652 F.2d 461 (9th Cir. 1976) and *United States v. Sanchez-Meza*, 547 F.2d 461 (1976). The City's reading of both of these cases is that they represent attempts by the Ninth Circuit to expand the concept and scope of jury trials way beyond that established by the United States Supreme Court. The City does not agree with the reasoning of the Ninth Circuit in either case and argues that while the Ninth Circuit (absent an overriding ruling from the

Supreme Court) can create a greater scope of jury trials in the federal courts under its appellate jurisdiction, its rulings are not binding upon the State of Nevada and are in direct contradiction with the case law established by the Supreme Court, which is binding upon Nevada. Moreover, both *Craner* and *Sanchez-Meza* concerned federal offenses taking place on federal land. Thus, interpretation of federal statutory law was involved, not state law.

Not every federal court agrees with *Craner*. In *United States v. Fletcher*, 505 F.Supp. 1053 (1981), the United States District Court for the Western District of Virginia not only summarily denied a request for a jury trial involving a DUI committed in a federal park, but also rejected the *Craner* concept of looking beyond the authorized penalties. Indeed, the *Fletcher* Court specifically held that:

> . . . the revocation of the right to operate a vehicle upon the highways, . . . is not a part of the punishment provided by law to be fixed by a court or jury upon conviction of a crime. The revocation . . . follows as a consequence and effect of conviction for crime. *Fletcher* at 1054.

Another federal court has rejected the concept that courts should consider the treatment of the offense at common law or whether the offense is *malum in se*, again in direct conflict with *Craner* and *Sanchez-Meza*. The United States District Court for the District of Puerto Rico, in *Matos v. Rodriquez*, 440 F.Supp. 673 (1976), firmly rejected the "nature of the offense" method of classifying crimes for purposes of jury trials. The Court gave great

weight to the Supreme Court decision in *Frank, supra,* and stated that:

> . . . the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. It concluded that of the objective indicators, the most important is the severity of the sentence. In cases where the maximum penalty has been provided for in a statutory manner, the legislature has been said *to include within the penalty imposed a statement about the seriousness of the offense.* . . .
>
> . . . It is thus clear that the doctrine of *District of Columbia v. Colts,* supra, wherein the primary importance was given to the nature of the offense, is no longer applicable. *Matos* at 676, 677.

Even the Ninth Circuit has had occasion to backtrack with regard to its decision in *Craner.* In *United States v. Arbo,* 691 F.2d 862 (1982), the Ninth Circuit referred to its policy in *Craner.* In *Arbo,* the defendant was charged with a violation of both federal statute and a federal regulation. The Court noted that its decision in *Craner* was based on "extraordinary circumstances", that is the lack of legislative judgment because the offense arose from a federal regulation. But in *Arbo,* the Court said no extraordinary circumstances existed since the defendant was charged under a federal statute, which did show legislative judgment that the crime should be a petty offense and triable without a jury.

In addition to the *Arbo* decision, the Ninth Circuit has, in one other opinion, apparently recanted, at least in part, the doctrine in *Craner.* In *United States v. Jenkins,* 734 F.2d 1322 (1983), the Court found that the imposition of a two year probation period under the Youth Corrections

Act did not create extraordinary circumstances warranting a jury trial; that this collateral consequence did not remove the offense from the petty category because it was punishable by not more than six months in jail. (Jenkins involved a simple assault.)

Given the detailed review of the case law contained in this Brief of the decisions of the United States Supreme Court, together with an in depth reading of the decisions of the Ninth Circuit, which are often ambiguous at best, it is evident that DUI offenders in the State of Nevada, and, more specifically, those charged in the Municipal Court of North Las Vegas, do not have a constitutional right to a trial by jury.

For the reasons heretofore stated, the City requests that the Court uphold the decision and order below and remand the case to the Eighth Judicial District Court for a trial do novo without a jury. The nature of a misdemeanor DUI offense in Nevada has not changed from what is categorized as "petty" to that of "serious". The maximum authorized punishment remains at six months in jail, which constitutes a clear line of demarcation between petty and serious offenses.

DATED this 30th day of July, 1987.

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CERTIFICATE OF MAILING

I hereby certify that I served a copy of the foregoing Respondents' Answering Brief by placing a true and correct copy of the same for mailing sealed in an envelope properly addressed for mailing in the United States Mail at North Las Vegas, Nevada, postage prepaid, addressed to:

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DATED this 30th day of July, 1987.

/s/ Sherry Berrett
An Employee of the City of
North Las Vegas

IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents. CITY OF NORTH LAS VEGAS, NEVADA, Real Party in Interest.	)	No. 17940

APPELLANT'S REPLY BRIEF

(Filed Sept. 2, 1987)

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I.

LEGAL MEMORANDUM

Counsel, in this Reply Brief, wishes only to point out two (2) recent cases which have allowed jury trials in DUI cases. The first is *Casper v. Cheatam*, No. 86-307, 07/21/87, a Wyoming Supreme Court case which has yet to be reported. The case is reported at 41 CrL 2354 (08/12/87) and a copy of that page is attached for the review of the Court in the Appendix. The majority appears to have based the finding on the Wyoming Constitution, but requires a jury trial or demand even when no jail term is possible upon conviction, and only a maximum fine of $750.00 can be imposed.

The second case is *Landry v. Hoepfner*, 818 F.2d 1169 (CA5 1987) wherein a three-judge panel held that the Sixth Amendment required a jury trial in a DUI case in Louisiana. There, upon conviction, the Court reasoned, a six (6) month jail term is possible, a fine of up to $500.00, serious economic repercussions can occur (increased insurance rates), public opprobrium, and a sixty (60)-day suspension of the driver's license. The reasoning of this case is impeccable. *Landry* was ordered set for *en banc* hearing, 822 F.2d 510 (CA5 1987).

II.

CONCLUSION

State and Federal cases overwhelmingly allow jury trials in DUI cases. The State of Nevada is one of a small minority of states which have shown reluctance to

recognize the right. This Court should require a jury trial upon demand in a first-offense DUI case.

DATED this 28th day of August, 1987.

GRAVES, LEAVITT & KOCH

/s/ John J. Graves, Jr.
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Appellant MELVIN BLANTON

IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF NORTH LAS VEGAS, NEVADA Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ADDELIAR D. GUY, DISTRICT JUDGE, Respondents. and MARK D. FRALEY, Real Party in Interest.	No. 18065

WRIT OF CERTIORARI

(Filed Dec. 31, 1987)

TO: The Honorable Addeliar D. Guy, Judge of the Eighth Judicial District Court:

WHEREAS, this Court having made and filed its written decision that a writ of certiorari issue,

NOW, THEREFORE, you are compelled to vacate your order reversing Mark D. Fraley's conviction and to enter a new order consistent with the decision of this court; in your case entitled Mark D. Fraley v. City of North Las Vegas, Case Number C76512.

WITNESS The Honorables E. M. Gunderson, Chief Justice, Thomas L. Steffen, Cliff Young, Charles E. Springer and John C. Mowbray, Associate Justices of the Supreme Court of the State of Nevada, and attested by my hand and seal this 31st day of December, 1987.

(SEAL)

Judith Fountain
Clerk

/s/ Jeanne C. Richard
Chief Deputy Clerk of the
Supreme Court

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 20, 1988

Mr. John Julian Graves Jr.
601 South Sixth Street
Las Vegas, NV 89101

Re: Melvin R. Blanton and Mark D. Fraley, v. City of North Las Vegas, Nevada No. 87-1437

Dear Mr. Graves:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

June 20, 1988

Mr. John G. Watkins
333 N. Rancho Drive, #633
Las Vegas, NV 89106

Re: Melvin R. Blanton and Mark D. Fraley, v. City of North Las Vegas, Nevada No. 87-1437

Dear Mr. Watkins:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted.

Very truly yours,

Joseph F. Spaniol, Jr., Clerk
/s/ Joseph F. Spaniol, Jr.

---

(6)

No. 87-1437

Supreme Court, U.S.
FILED
AUG 4 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON,
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS,
NEVADA

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Nevada

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QUESTION PRESENTED

Whether the misdemeanor offense of driving a vehicle while intoxicated under Nevada state law is a "serious" crime to which the right to jury trial applies.

PARTIES

Petitioners are MELVIN R. BLANTON, and MARK D. FRALEY, Defendants separately charged in the City of North Las Vegas, Nevada, with the misdemeanor offense of driving under the influence of intoxicating liquor, NRS 484.379; Respondent, City of North Las Vegas, is an incorporated city in the State of Nevada pursuant to 1983 Nevada Statutes Chapter 517 at 1391-1437; 1971 Nevada Statutes Chapter 573 at 1210-1229.

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OPINION BELOW

The Supreme Court of Nevada ruled that a defendant charged with the State misdemeanor offense of driving a vehicle while under the influence of an intoxicating liquor, which carries a fine of not more than $1,000, imprisonment of not more than six months in jail, as well as other penalties, has no right to trial by jury pursuant to the Constitution of the State of Nevada, Article I, § 3, or Amendment VI to the United States Constitution, *Blanton v. North Las Vegas Municipal Court*, 103 Nev. A.O. 135, 748 P.2d 494 (1987); Appendix to Petition for Writ of Certiorari, Tab "A".

JURISDICTION

Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3). The Supreme Court of Nevada denied Petitioners' claim of right to trial by jury in a misdemeanor DWI offense, under the federal Constitution on December 31, 1987, and the petition for writ of certiorari was docketed in this Court on February 26, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of Amendment VI to the United States Constitution provides:

> (I)n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . .

The pertinent part of Amendment XIV to the United States Constitution provides:

> (N)or shall any state deprive any person of life, liberty, or property witnout due process of law . . .

Article III, Section 2, paragraph 3 provides, in pertinent part:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by jury; . . .

STATEMENT OF THE CASE

Melvin R. Blanton

Blanton was arrested for driving a vehicle while under the influence of intoxicating liquor (no accident) on July 18, 1986 in the City of North Las Vegas, Nevada. Probable cause for the stop consisted of varying speeds and several crossings of the lane divider by Blanton's car. An odor of alcoholic beverage about his person, red and bloodshot eyes, and the officer's belief that he failed the field sobriety test, led to Blanton's incarceration, and the drawing of blood to determine the blood-alcohol level.

Defendant was arraigned through counsel on August 19, 1986, entering a plea of not guilty to the charge of D.U.I., NRS 484.379 (first offense). (J.A. 1) Written demand for jury trial was made on October 3, 1986, (J.A. 6-7) to which demand the City interposed written objection. (J.A. 7-10) The demand was later denied by the Municipal Court Judge.

A pre-trial petition for writ of mandamus was filed on November 3, 1986, in the Eighth Judicial District Court

in and for the County of Clark, State of Nevada, a court of general jurisdiction. (J.A. 13-16) The City of North Las Vegas again filed an answer and a legal memorandum opposing the granting of the writ. (J.A. 18-20) District Court Judge Michael Wendell denied the writ on January 14, 1987, (J.A. 20-21) and an appeal was filed by Blanton to the Supreme Court of the State of Nevada on January 20, 1987. (J.A. 21-23)

After Blanton's appeal and other cases were consolidated in the state Supreme Court on the basis of the common issue of a jury trial in misdemeanor D.U.I. prosecutions, the appeal was briefed, culminating in oral argument in Carson City, Nevada on September 18, 1987. (J.A. 5) The Supreme Court of Nevada rendered its Decision, per Justice Gunderson, on December 31, 1987, denying Blanton, and the Defendants in the other consolidated cases, the option of a jury trial; the Decision was based upon the State of Nevada and Federal Constitutions.

A timely petition for writ of certiorari was thereafter docketed in this Court by Blanton on February 26, 1988; this petition was granted on June 20, 1988. (J.A. 102)

Mark D. Fraley

Fraley was arrested for driving a vehicle while under the influence of intoxicating liquor on June 29, 1986 in the City of North Las Vegas, Nevada. Probable cause for this stop consisted of the arresting officer's observation of Fraley's vehicle (at low speed) striking a traffic-control device. A moderate odor of alcoholic beverage about his person, bloodshot and watery eyes, and the officer's opinion that he failed the field sobriety test, led to Fraley's incarceration. Fraley refused a chemical test.

Defendant was arraigned on July 15, 1986, entering a plea of not guilty to the charge of driving under the influence of intoxicating liquor, NRS 484.379 (first offense). (J.A. 1) Written demand for jury trial was made (J.A 11), which demand was denied by the Municipal Court Judge on October 28, 1986. (J.A. 1) Fraley entered a plea of guilty to the charge of D.U.I. on October 29, 1986 (J.A. 1), and received a fine of $300, five (5) days incarceration, and mandatory alcohol education school. Appeal was timely taken to the Eighth Judicial District Court in and for the County of Clark, State of Nevada, a court of general jurisdiction, for a trial *de novo*, pursuant to NRS 266.565.[1] (J.A. 16-17) Demand for jury trial was also filed in that court by Defendant (J.A. 23-25), and the City of North Las Vegas opposed the same. District Court Judge Addelair Guy ruled on January 30, 1987, that the North Las Vegas Municipal Court must grant a jury trial to Fraley, and further ruled that NRS 266.550 (precluding municipal courts from conducting jury trials) was unconstitutional. (J.A. 25-27)

---

[1] Misdemeanor offenses, including DWIs are prosecuted in either Municipal (City) Courts (NRS 5.050) or Justice (County) Courts (NRS 4.370). A defendant convicted after trial or after plea of guilty in City court may appeal to the local District Court for a trial *de novo*. NRS 266.565. A defendant convicted after trial in Justice Court (a court of record) may appeal to the District Court where trial errors are challenged in briefs as in normal appellate cases. NRS 189.050. A party aggrieved at the District Court level in a misdemeanor offense may only bring an issue before the Supreme Court of Nevada by extraordinary writ, as only cases originating in District Courts may appeal as of right. Constitution, Article 6, §§ 4 and 6. There is no intermediate court of appeal in the State of Nevada.

The City of North Las Vegas, Nevada filed an original petition for writ of certiorari in the Supreme Court of the State of Nevada on April 13, 1987. (J.A. 28-52) That case was consolidated in the Supreme Court of Nevada with other cases (including Petitioner Blanton's herein) on the basis of the common issue of jury trial in misdemeanor DWI prosecutions. (J.A. 4-5) The matter was briefed, and oral argument took place in Carson City, Nevada on September 18, 1987. (J.A. 5) The Supreme Court of Nevada rendered its Decision, per Justice Gunderson, on December 31, 1987, granting the City's writ and thereby denying Fraley, and the defendants in the other consolidated cases, the option of a jury trial in misdemeanor DWI prosecutions.

A timely joint petition for writ of certiorari was filed in this Court with Melvin R. Blanton; this petition was granted on June 20, 1988. (J.A. 103)

SUMMARY OF ARGUMENT

This Court has previously set out a "bright line" test of 6 months incarceration and a $500 fine to separate petty from serious offenses as regards the right to trial by jury. Nevada's Driving While Intoxicated (hereinafter "DWI") law carries a potential 6 month sentence and a $1,000 fine, but also carries a host of other penalties that "pack" the offense "below the line". These penalties include mandatory minimum incarceration and fine, community service in lieu of incarceration with the defendant dressed in distinctive garb identifying him as a DWI offender, a mandatory alcohol educational course

paid by the defendant, and a mandatory 90-day driver's license revocation. A second offense within 7 years carries increased minimum jail time and fine, and a third conviction is a felony carrying 1 year mandatory in the Nevada State Prison and a large minimum fine. The convicted person is stigmatized as a convicted drunk driver, and automobile insurance rate hikes routinely follow. These serious penalties mandate a right to trial by jury in a first-offense DWI prosecution.

The "National standard" test approved most recently in *Baldwin v. New York*, 399 U.S. 66, 70, 90 S.Ct. 1886, 1889, 26 L.Ed.2d 437 (1970) allows trial by jury in DWI. Our research indicates 46 States which allow a jury trial, with 4 States and the District of Columbia denying.

The "nature of the offense" test first used in *Callan v. Wilson*, 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888), reaffirmed in *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930), and more recently approved in *Baldwin v. New York, supra*, 399 U.S. at 69, 90 S.Ct. at 1888, n.6, defines DWI as a "serious" offense. In the last 10 years the intoxicated driver has been spotlighted by national groups as a menace. Statutory punishments have increased, including alcohol treatment and education, driver's license sanctions, and community service. Our society views drunk driving as a serious criminal offense. In addition, several federal and state courts have held that DWI is a malum in se offense, and thereby "serious".

These 3 tests, separately and considered together, undeniably require a trial by jury in a DWI case in Nevada. Petitioners seek no new rule for this offense before this Court. DWI is, however, an offense that our

society has now singled out for harsh penalty. The "bright line" penalty-based rule of 6 months and a $500 fine is so intensely bright that it has eclipsed other well-grounded rules used to evaluate the right to trial by jury, thereby retarding the recognition of DWI as a "serious" offense by lower courts.

ARGUMENTS

I

THE TESTS

In *Callan v. Wilson*, 127 U.S. 540, 555 (1888), this Court declared that the crime of conspiracy was a "criminal and indictable offense" at common law and an offense of a grave character affecting the public at large. Pursuant to Art. 3 of the federal Constitution, and Amendments V and VI thereof, it was held that the "nature of the crime" of conspiracy secured to the defendant the right to trial by jury. Sixteen years later, in *Schick v. United States*, 195 U.S. 65, 24 S.Ct. 826, 49 L.Ed. 99 (1904), a maximum penalty of $50 for a violation of the Oleomargarine Act was found not to warrant trial by jury due to the small penalty and the nature of the offense. *District of Columbia v. Colts*, 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) granted a trial by jury for the offense of "reckless driving", carrying a $25 to $100 fine, and minimum jail time of 10 days not to exceed 30. The offense was found to be malum in se and indictable at common law. A scant 7 years later, in *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed 843 (1937), an offense of selling personalty without a business license which carried a

penalty of as much as a $300 fine and 90 days in jail was found not triable to a jury. Neither the penalty nor the nature of the offense was deemed serious enough to warrant trial by jury. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), applied the federal Sixth Amendment to the States through the Fourteenth Amendment, and held that 2 years potential imprisonment entitled the defendant to a jury trial. Incarceration of up to 6 months was found not to require a jury trial if the crime otherwise qualified as a petty offense. 391 U.S. at 159, 88 S.Ct. at 1453. This Court also observed:

> But the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment. . . .The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgments." *Id.*

And at 391 U.S. 161, 88 S.Ct. 1453:

> In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by District of Columbia v. Clawans, supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation. (Emphasis added).

Baldwin v. New York, 399 U.S. 66 (1970), established the "bright line" test of 6 months incarceration or less to deny the right to jury trial. Recognizing that the most relevant criterion is the severity of the maximum authorized penalty, *Frank v. United States*, 395 U.S. 147, 148, 89 S.Ct. 1503, 1505, 23 L.Ed.2d 162 (1969), and thereby applying State practices (objective criteria), a jury trial for a potential 1 year jail sentence was required. No new

analytical framework was developed. This Court, at n.6, 399 U.S. 69, 90 S.Ct. 1888, first sentence, reiterates the "nature of the offense" test, and in the second sentence, announces that " . . . we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe *by itself* to take the offense out of the category of 'petty'. . . ." (Emphasis added).

See, *Muniz v. Hoffman*, 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975).

A distillation of these cases illustrates 3 frameworks from which the right to trial by jury springs:

1) the nature of the offense;

2) the potential penalty or punishment; and,

3) the Nation's judgment, i.e., objective criteria existing in the laws and practices in the Nation.

In the case at bar, petitioners seek to isolate one special offense which has gained the Nation's attention and wrath over the last 10 years. The offense of driving while intoxicated will be shown to be "serious" when viewed from any of the 3 perspectives above.

II

THE PENALTY FOR CONVICTION OF DWI IN NEVADA RENDERS THE OFFENSE SERIOUS

It is unlawful in the State of Nevada to drive a vehicle on a highway or on premises to which the public has access while under the influence of intoxicating liquor, or for the driver to have 0.10 percent or more by weight of alcohol in his blood. NRS 484.379. The offense is a misdemeanor carrying a fine of as much as $1,000

and 6 months incarceration in the county jail. NRS 484.3792. In 1986, the year of the arrests herein, the following statutory consequences (NRS 484.3792) were evident for a first offense conviction:

1) A fine of no less than $200 or more than $1,000

2) Imprisonment for not less than 2 days or more than 6 months which is non-probationable or suspendable, or to perform 48 hours of community service while dressed in distinctive garb identifying the person as a DWI violator

3) An educational course on alcohol abuse and controlled substances at the expense of the defendant

4) The offense is non-negotiable for the prosecuting attorney unless the charge is not supported by probable cause or cannot be proved at trial

5) A second offense of DWI within 7 years is a misdemeanor carrying a minimum of 10 days incarceration and a fine of not less than $500

6) A third or subsequent offense within 7 years is a felony punishable by no less than 1 year or more than 6 years in prison, and a fine of no less than $2,000 to $5,000. The offender, if practicable, must be assigned to a minimum security facility.

Additionally, NRS 483.460(1)(c) requires mandatory driver's license revocation upon conviction for 90 days; only after 45 days of that period is served may the State issue a restricted license for work, or for obtaining food and medical supplies if the driver can show a "severe hardship". NRS 483.490(2). NRS 484.384(4) allows a

reduction of this period by any period of revocation previously imposed by the Department of Motor Vehicles for the driver having had 0.10% or more by weight of alcohol in his blood at the time of arrest. NRS 484.384(3). Property interests of the convicted person are affected, as automobile insurance premiums invariably increase (usually double or triple).

Lastly, the individual must bear the social stigma of being a convicted drunk driver. *Argesinger v. Hamlin*, 407 U.S. 25, 48, 92 S.Ct. 2006, 2019, 32 L.Ed.2d 530 (1972).

In *Baldwin v. New York*, 399 U.S. 66, 69, 90 S.Ct. 1886, 1988, n.6, 20 L.Ed.2d 437 (1970), this Court stated that " . . . we decide only that a potential sentence in excess of six months' imprisonment is sufficiently severe by itself to take the offense out of the category of 'petty'." A six-month penalty has been held to be short enough to classify the offense as "petty". *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220, 88 S.Ct. 1472, 1475, 20 L.Ed.2d 538 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). This Court has never held that the right to trial by jury does not attach to an offense which carries a potential jail term of 6 months or less, which is otherwise considered "serious"; indeed, the Court recognized in *Baldwin*, 399 U.S. at 68, 90 S.Ct. at 1888, that " . . . the task before us in this case is the essential if not wholly satisfactory one, . . . of determining the line between 'petty' and 'serious' for the purposes of the Sixth Amendment right to jury trial." The unsatisfactory process of definition of " . . . the boundaries of the petty offense category have always been ill-defined, if not ambulatory." *Duncan v. Louisiana*, 391 U.S. at 160, 88

S.Ct. at 1453. Rules defining petty offenses are dynamic, changing with need, as at common law.

Petitioners in this case do not seek a new "bright line" test. What they do seek is a right to trial by jury on a special offense that has been winnowed from the petty offense category and specially punished. This Court recognized the existence of such crimes in *Duncan, supra,* 391 U.S. at 159-60, 88 S.Ct. at 1453, " . . . Crimes carrying possible penalties up to six months do not require a jury trial *if they otherwise qualify as petty offenses, Cheff v. Schnackenberg,* 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) . . . " (Emphasis added). And at 384 U.S. 161, 88 S.Ct. 1453:

> In determining whether the length of the authorized prison term *or the seriousness of other punishment* is enough in itself to require a jury trial, we are counseled by District of Columbia v. Clawans, supra, to refer to objective criteria, chiefly the existing laws and practices in the Nation. (Emphasis added).

The *Duncan* decision looked no further than the length of the sentence, but the words "other punishment" have independent vitality, and anticipate the possibility of an offense "serious" by a measure other than length of sentence. As in *Baldwin,* this Court must compare Nevada's punishment of DWI with other States. January, 1986 statistics indicate that Nevada's punishments for DWI are as stringent as, or more stringent than, other States in the nation. Appendix "B" hereof.[2] Indeed, Appendix "A"

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[2] U.S. Department of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Standards, 1986, NCJ 105287, Table 1.56

hereof indicates by asterisk that 21 States (by our count) punish DWI by a potential sentence of 1 year or more; further, 46 States allow jury trials in DWI prosecutions.

In terms, then, of Nevada's punishment for DWI (which is commensurate with the Nation), and Nevada's deprivation of a right to trial by jury (which is not commensurate with the Nation), the *Baldwin* case is persuasive authority.

FINE: In reviewing Nevada's potential and mandatory punishment for DWI (NRS 484.3792), the maximum fine by itself may be enough to trigger a right to trial by jury. The case of *Rife v. Godbehere,* 814 F.2d 563 (CA9 1987) ruled that a State habeas petitioner convicted of a misdemeanor and fined $1,000 had a federal constitutional right to trial by jury. *Muniz v. Hoffman,* 422 U.S. 454, 95 S.Ct. 2178, 45 L.Ed.2d 319 (1975), was distinguished on the basis that the contemnor was a labor union, a "non-individual." As stated in *Muniz,* 422 U.S. at 476-77, 95 S.Ct. 2190-91, this Court has not accorded the six-month incarceration and $500 fine boundaries "talismanic significance." However, the potential fine in the case at bar ($200 of which is mandatory) as well as a potential six-month jail sentence moves DWI to the "serious" category, at least as defined by *Duncan* and *Baldwin.*

MANDATORY INCARCERATION: Although Nevada's penalty of 6 months' incarceration or less after a DWI conviction is within the *Baldwin* boundary, 2 days of that period cannot be suspended. Far more serious felony crimes in Nevada are probationable with no mandatory jail time (e.g., robbery, NRS 200.380; burglary, NRS

205.060; voluntary manslaughter, NRS 200.080). See, *Bronson v. Swinney*, 648 F.Supp. 1094, 1099 (D.Nev. 1986). This is a clear indication that the citizens of Nevada, through their legislators, consider DWI a "serious" crime. Only 16 States have mandatory minimum incarceration on first conviction DWI. See Appendix "B" hereof.

MANDATORY LOSS OF DRIVER'S LICENSE: NRS 483.460(1)(c) requires a 90-day loss of driving privileges upon conviction of DWI. This Court stated in *Bell v. Burson*, 402 U.S. 535, 539, 91 S.Ct. 1586, 1589, 29 L.Ed.2d 90 (1971) that:

> Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment.

Other courts have conceded the right to trial by jury partly on the basis of the potential loss of a driver's license. *United States v. Craner*, 652 F.2d 23 (CA9 1981); *United States v. Woods*, 450 F.Supp. 1335, 1346 (D.Md. 1978); *Brady v. Blair*, 427 F.Supp. 5, 10 (S.D. Ohio 1976); *Bronson v. Swinney, supra*, 648 F.Supp. at 1099; *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).

48 HOURS OF COMMUNITY SERVICE DRESSED IN DISTINCTIVE GARB: An individual convicted in North Las Vegas may choose to perform 48 hours (6-8 hour days) of community service wearing a "convict-striped" black and white pullover shirt with a large white circle on the back. Within the circle is a drawing of a liquor bottle with a prominent skull and crossbones on the label. The

bottle is surrounded by a red circle with a red line through the middle (similar to a "no smoking" sign). Between the border of the red circle and the edge of the greater white circle are the initials "D.U.I." at the top and "OFFENDER" at the bottom (the matching pants to this outfit, for some reason, are no longer worn). Community service is performed in lieu of 2 days of jail time. Community service is a proper condition of probation, *United States v. Arthur*, 602 F.2d 660, 664 (CA4), *cert. denied*, 444 U.S. 992, 100 S.Ct. 524, 62 L.Ed.2d 422 (1979), " . . . so long as it is reasonably related to rehabilitation of the probationer, . . . deterrence of future misconduct by the probationer or general deterrence of others, (or) deserved punishment." *United States v. Tonry*, 605 F.2d 144, 148 (CA5 1979). See also *United States v. Restor*, 679 F.2d 338 (CA3 1982). Even assuming that community service is non-penal and that the "garb" will deter others, it is clearly punishment to the offender and "marks" him to the public at large over an extended period as a convicted DWI offender. Such extraordinary punishment is unique in Nevada, and perhaps in the Nation, indicating again how "serious" the crime is considered.

If a page from Eighth Amendment lore may be contrasted, " . . . Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of those traditional penalties is constitutionally suspect. . . . " *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

NO NEGOTIATION: The prosecutor cannot negotiate the DWI offense. NRS 484.3792(3). This plea-bargain straitjacket is rare, *Bronson v. Swinney, supra*, 648 F.Supp.

at 1099, and of all the provisions here set out, this one forces a plea, or a trial to the judge. Nevada's conviction rate in 1987 was 82% (9,722 persons arrested and 8,001 convicted by plea or trial).[3]

SUCCESSIVE OFFENSES: A minimum period of incarceration of 10 days for a second conviction within 7 years, without a jury, and a felony conviction carrying 1 to 6 years imprisonment (1 year of which is not suspendable) for a third conviction within 7 years, reflect the seriousness of a single misdemeanor conviction of DWI in Nevada.

ALCOHOL EDUCATION: Alcohol education has been held a proper condition of probation, *Holterhaus v. State*, 417 S.2d 291 (Fla. App. 1982), *State v. Watkins*, 125 Ariz. 570, 611 P.2d 923 (1980). Here, however, the defendant must pay the cost of the program himself (about $175). NRS 484.3792(1)(a)(1).

The punishment contained in and collateral to the misdemeanor DWI statute in Nevada in 1986 is harsh; a person charged with this crime should have the option of a trial by jury. For this Court to allow such punishment to go unanswered will encourage legislatures to "pack" petty offenses with penalties that do not puncture the 6-month incarceration line, and to simultaneously deny the right to trial by jury.

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[3] Statistics of Department of Motor Vehicles and Public Safety, 6/30/88, provided by B.R. Vidmar, Highway Safety Representative, 555 Wright Way, Carson City, Nevada 89710.

III

MOST STATES ALLOW TRIAL BY JURY IN DWI PROSECUTIONS

Appendix "A" hereof indicates that 46 State jurisdictions allow a jury trial in first-offense DWI prosecutions if not in the first instance, then on appeal. The District of Columbia, Louisiana, New Jersey, New Mexico, and Nevada do not.

This Court first compared State imprisonment patterns in *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937) in determining that a maximum fine of $300 and 90 days' imprisonment (as well as the "moral quality" of the offense) did not trigger a right to trial by jury. A similar analysis was used in *Duncan v. Louisiana*, 391 U.S. 145 (1968) and *Baldwin v. New York*, 399 U.S. 66 (1970).

Since the "bright line" test of 6 months' incarceration and a $500 fine has been established for almost 20 years now, some lower federal courts have analyzed the issue in terms of numbers of State jurisdictions allowing trial by jury in DWI prosecutions, instead of State patterns of potential incarceration. *United States v. Craner*, 652 F.2d 23, 27 (CA9 1981); *United States v. Woods*, 450 F.Supp. 1335, 1347 (D.Md. 1978) (federal regulation); *Brady v. Blair*, 427 F.Supp. 5, 10 (S.D. Ohio 1976) (city ordinance); *Landry v. Hoepfner*, 840 F.2d 1201, 1217 (CA5 1988), *en banc*, (no right to jury trial in Louisiana DWI offense); *Bronson v. Swinney*, 648 F.Supp. 1094 (D. Nev. 1986) (trial by jury mandated). See *Welsh v. Wisconsin*, 466 U.S. 740, 763, 104 S.Ct. 2091, 2104, 80 L.Ed.2d 732 (1984) (White, J., dissenting joined by Rehnquist, J.) where two members of

this Court (albeit in a fourth amendment setting) analyzed the "seriousness" of the Wisconsin DWI law in terms of the right to trial by jury, among other factors. In the DWI prosecution, of course, this approach is justified because most State jurisdictions allow a trial by jury no matter the penalty.

At least since the *Clawans* decision, *supra*, this Court appears to have sought National uniformity in the jury trial area. To hold that a defendant in a DWI prosecution has a right to trial by jury will continue that needed uniformity.

IV

THE NATURE OF THIS OFFENSE REQUIRES THE RIGHT TO TRIAL BY JURY

The vast majority of States define driving while intoxicated as driving under the influence of intoxicating liquor, or driving while having 0.10% or more by weight of alcohol in the blood (0.10% is considered to be legal intoxication in 39 States and the District of Columbia, 0.08% in 2 States, 0.12% in 1 State, and 0.15% in 1 State; the other 7 States have a presumptive level of 0.10% where the defense can rebut the presumption).[4] In Nevada, the level of 0.10% or more is presumptive of DWI, while being under the influence of intoxicating liquor is more a factor of improper driving, facts drawn from a

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[4] U.S. Department of Justice, Bureau of Justice Statistics, Report to the Nation on Crime and Justice (2nd Ed.), March 1988, MCJ 105506, p.7.

field-sobriety test, and observation of the driver. An individual may, for example, be prosecuted for DWI with a level of 0.08% blood alcohol (no presumption) when his driving or the factual results of a field-sobriety test indicate intoxication. Cf., NRS 484.381.

Nationwide, in 1985, there were 1,788,400 non-juvenile arrests for DWI, which constituted 15% of all arrests in that year.[5] It is estimated that 40% of the 43,800 traffic-related deaths in the United States in 1985 involved a blood-alcohol level that exceeded the legal limit[6], and in 1986 more than 650,000 persons were injured in alcohol-related motor vehicle crashes.[7] It has been estimated that property damage, medical costs, and other costs of drunk driving may exceed $24 billion annually.[8] More significantly, between 1970 and 1986 DWI arrests increased nearly 223%, while the number of licensed drivers increased by 42%.[9]

In the past few years, national organizations such as Mothers Against Drunk Driving (MADD) whose membership is now claimed at 600,000 with 400 chapters, *Landry v. Hoepfner*, 818 F.2d 1169, 1176 n.3 (CA5 1987), and Students Against Drunk Driving (SADD) have extensively publicized the individual and societal costs of drunk driving. Their efforts have brought this message

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[5] Report to the Nation on Crime and Justice, *supra*, at 67 and 40.

[6] Id., at 7.

[7] U.S. Department of Justice, Bureau of Justice Statistics, Special Report, Drunk Driving, February 1988, NCJ 97221, p.1.

[8] Id.

[9] Id.

via informational spots in movie houses, television and radio, on billboards, and by telephone, especially during holiday seasons when overindulgence is common. Most States, including Nevada, have implemented sobriety checkpoints to deter drunk driving in problem areas. Twelve States have passed "happy hour" legislation which limits the sale of alcoholic beverages in quantity for a reduced price during certain hours.[10] In 1986, 16 States imposed mandatory imprisonment for first conviction DWI, 42 States for a second conviction, and 40 States for a third conviction; 25 States required mandatory license suspension or revocation for a first conviction, 44 States for a second conviction, and 44 States for a third conviction.[11] Thirty-two States permit or require community service of some type upon conviction, with 47 States permitting or requiring alcohol education or treatment programs.[12] A local paper, the Reno Gazette-Journal, every few days, runs the names, addresses, and punishments of persons convicted of DWI, even reporting plea negotiations to lesser charges (see Wednesday, June 22, 1988 ed., p.2C). At least one bill is pending in the United States Senate, sponsored by Sen. Frank Lautenberg, D-N.J., which would appropriate more federal money to States which toughen their drunk driving laws.

Appendices "C" and "D" hereof show, respectively, the numbers of jury trials in misdemeanor cases in reporting States in 1985, and numbers of jury trials in DWI/DUI cases in reporting State courts in 1985. These

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[10] Report to the Nation on Crime and Justice, *supra*, at 7.

[11] Id., at 94.

[12] Id., Sourcebook of Justice Statistics, Table 1.56.

statistics bear out similar statistics set out in *Baldwin v. New York*, 399 U.S. 66, 75, n.22, 90 S.Ct. 1886, 1891, 26 L.Ed.2d 437 (1970), that there will be a high waiver rate of jury trials in these types of cases. With these societal dynamics as a backdrop, does the very nature of the offense of DWI bring it within the constitutional guarantee of trial by jury?

There is respectable authority for the proposition that DWI was not an offense indictable at common law. *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (1917); *Whirley v. State*, 450 S.2d 836, 838 (Fla. 1984); *State ex rel. Sellers v. Parker*, 87 Fla. 181, 100 S. 260 (1924); *State v. Morrill*, 123 N.H. 707, 465 A.2d 882, 885 (1983); *Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966). But see, *United States v. Hart*, 26 Fed. Cas. 193 (D.Pa. 1817). First, DWI as we know it was not known to the common law, and comparison to a drunk equestrian or driver of a wagon and team is not congruent with the automobile's high speed and the congested conditions of our time. *United States v. Craner*, 652 F.2d 23, 26 n.3 (CA9 1981). DWI, with its attendant mischief, would clearly have been indictable at common law. Second, the factor of "indictable at common law" seems to have been abandoned by this Court. Last mentioned in *District of Columbia v. Colts*, 282 U.S. 63 (1930), along with the "nature of the offense" test, 282 U.S. 73, it was not found to be a relevant consideration in *District of Columbia v. Clawans*, 300 U.S. 617, 625 (1937) where penalty only was considered, and it was not mentioned as a part of the "nature of the offense" test in *Baldwin v. New York, supra*, 399 U.S. 69, 90 S.Ct. 1888, n.6; *United States v. Woods*, 450 F.Supp. 1335, 1342 (D.Md. 1978).

In *Callan v. Wilson*, 127 U.S. 540 (1888) this Court described a "conspiracy" as " . . . an offense of a grave character, affecting the public at large; . . . " 127 U.S. 556. A violation of the Oleomargarine Act of 1901 carrying a fine of $50 involved no moral delinquency, and therefore no trial by jury was required. *Schick v. United States*, 195 U.S. 65 (1904). And the crime of reckless driving was found to be an offense malum in se to which a right to jury trial attached. *District of Columbia v. Colts, supra.*

The offense of DWI has been held to be one malum in se and an act repugnant to the moral sense of the community. *Rothweiler v. Superior Court of Pima County, supra; State v. O'Brien*, 704 P.2d 883 (Haw. 1985); *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970); *Fisher v. State*, 305 Md. 357, 504 A.2d 626 (1986); *Parham v. Municipal Court, City of Sioux Falls*, 199 N.W.2d 501 (SD 1972); *City of Casper v. Cheatam*, 739 P.2d 1222 (Wyo. 1987); *United States v. Craner, supra; Brady v. Blair*, 427 F.Supp. 5 (S.D. Ohio 1976); *United States v. Woods, supra.*

In sum, the offense of DWI is one malum in se to which a right to trial by jury attaches; any requirement that the offense be indictable at common law seems to have been abandoned in 1937 in *Clawans, supra.*

V

THE LOWER COURT DECISION

The Decision of the Nevada Supreme Court in this case boils down to a strict reading and reaffirmation of the *Baldwin*, standard, and a reluctance to transcend that standard. See, *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). The lower court felt that this

Court had retreated from the *Colts, supra*, decision where the "nature of the offense" was of primary concern, and had moved instead to a more workable rule based on potential penalties. The court listed the following policy considerations in support of the denial of right to trial by jury:

1) Bench trials are speedy and inexpensive.

The right to trial by jury has never turned on these considerations. Summary adjudications for petty offenses are proper, as the acts " . . . (do) not offend too deeply the moral purposes of the community, . . . , and (are) stigmatized by punishment relatively light . . . ."[13] But cost is never a consideration if the offense is serious.

2) The cost to jurors in time and money, and procedures for summons and selection of jurors in municipal court.

Other rural, thinly-populated States, e.g., North and South Dakota, and Wyoming, grant trial by jury. The lower court further speculates that jury duty for citizens in outlying areas may be onerous. But this duty is as onerous for felony trials as well. The court's further fear that municipal and justice courts will adjudicate DWI jury trials may be groundless, as the jury trial will occur, no doubt by legislation, in District Court, the court of general jurisdiction. See, *Ludwig v. Massachusetts*, 427 U.S. 618, 96 S.Ct. 2781, 49 L.Ed.2d 732 (1976).

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[13] Frankfurter & Corcoran, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv.L.Rev. 917, 981 (1926).

3) Other misdemeanor crimes are as opprobrious as the DWI.

The court's cited offenses of indecent conduct and lewd behavior are indeed vile and despicable, but they are not "serious" in the constitutional sense so as to require trial by jury.

4) Concern for number of jurors.

The numbers of jurors in municipal or justice court in a prosecution would be a legislative decision at a special meeting of the legislature. Constitution, Art. 5, § 9. If DWI jury trials occur in the District Court, a 12-person jury will sit and the verdict will have to be unanimous. NRS 175.481.

5) The lower court's concern with non-lawyer judges presiding over DWI prosecutions.

First, if the jury trials are conducted in the District Court all judges are licensed attorneys. See NRS 3.060. Second, this Court has held that the " . . . concern in prior cases with judicial functions being performed by nonjudicial officers has also been directed at the need for independent, neutral, and detached judgment, not at legal training . . . ". *North v. Russell*, 427 U.S. 328, 96 S.Ct. 2709, 49 L.Ed.2d 534 (1976).

6) The right to trial by jury is a legislative decision.

Leaving the issue to the Nevada legislature to resolve does not satisfy constitutional needs. This issue has been around since at least *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983) and the State legislature has done nothing but make the penalties more severe without a

concomitant move to protect the integrity of the adjudicative process with trial by jury.

CONCLUSION

Wherefore, for the foregoing reasons, petitioners pray that the judgment below be reversed.

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APPENDIX "A"

STATES ALLOWING TRIAL BY JURY IN DWI PROSECUTIONS AT SOME LEVEL

* denotes 1 year possible jailtime or more
** denotes jury trial by court decision

1)	*Alabama	:	D.W.I. – Code of Alabama §32-5A-191 Jury Trial – Code of Alabama §15-14-30; *Hose v. State*, 489 So.2d 670 (Ala. Cr. App. 1986), *cert. denied*, 5/23/86 by Supreme Court of Alabama.
2)	*Alaska	:	D.W.I. – A.S. §28-35.030 Jury Trial – *Baker v. City of Fairbanks*, 471 P.2d 386 (Alaska 1970).
3)	**Arizona	:	D.W.I. – A.R.S. §28-692 Jury Trial – *Rothweiler v. Superior Court of Pima County*, 410 P.2d 479, 100 Ariz. 37 (1966).
4)	*Arkansas	:	D.W.I. – Arkansas Code §5-65-103 Jury Trial – Constitution, Declaration of Rights, Art. 2, §10.
5)	California	:	D.W.I. – Veh. Code §23152 Jury Trial – Constitution, Art. 1, §16; Code of Civil Procedure §194.
6)	*Colorado	:	D.W.I. – C.R.S. 42-4-1202 Jury Trial – Constitution, Bill of Rights, Art. II, §23; C.R.S. §16-10-109.

7) Connecticut : D.W.I. – G.S.A. §14-227a
Jury Trial – Constitution, Declaration of Rights, Art. 1, §8; G.S.A. §54-82b; *State of Englehart*, 256 A.2d 231, 158 Conn. 117 (1969).

8) Delaware : D.W.I. – D.C.A. 21 §4177
Jury Trial – Constitution, Bill of Rights, Art. 1, §7; *Coxe v. State*, Del. Supr., 281 A.2d 606 (1971).

9) Florida : D.W.I. – F.S.A. §316.193
Jury Trial – F.S.A. §316.1934(4).

10) *Georgia : D.W.I. – Code §40-6-391
Jury Trial – Constitution, Bill of Rights, Art. I, §1, para.11.

11) **Hawaii : D.W.I. – Hawaii Revised Statutes §291-4
Jury Trial – *State v. O'Brien*, 704 P.2d 883 (Hawaii 1985).

12) Idaho : D.W.I. – Code §18-8004
Jury Trial – *Miller v. Winstead*, 75 Idaho 262, 270 P.2d 1010 (1954); Constitution, Art. 1, §7.

13) *Illinois : D.W.I. – S.H.A. ch. 95-1/2, §11-501
Jury Trial – S.H.A. ch. 38, par. 103-6; Constitution, Bill of Rights, Art. 1, §8.

14) *Indiana : D.W.I. – Burns Indiana Statutes Annotated §9-11-2-2
Jury Trial – Constitution, Art. 1, §§12, 13.

15) *Iowa : D.W.I. – Code §321.281
Jury Trial – Constitution, Bill of Rights, Art. 1, §10; I.C.A. §813.3, Rule 45; *State of Iowa v. Droste*, 232 N.W.2d 483 (Iowa 1975).

16) Kansas : D.W.I. – K.S.A. §8-1567
Jury Trial – Constitution, Bill of Rights, §10; K.S.A. §22-3404.

17) Kentucky : D.W.I. – K.R.S. §189A.010
Jury Trial – Constitution, Bill of Rights, §11; K.R.S. §29A.270.

18) Maine : D.W.I. – M.R.S.A. 29 §1312-B
Jury Trial – Constitution, Art. 1, §6; *State v. Pineau*, 463 A.2d 779 (Me. 1983).

19) *Maryland : D.W.I. – Ann. Code of Maryland (Transportation) §21-902
Jury Trial – *Fisher v. State*, 504 A.2d 626 (Md. 1986).

20) *Massachusetts : D.W.I. – Massachusetts General Laws Annotated c. 90 §24
Jury Trial – M.G.L.A. c.263 §6; *Commonwealth v. Hesser*, 307 N.E.2d 10 (Mass. 1974) (jury trial on a parking ticket).

21) Michigan : D.W.I. – M.C.L.A. §257.625
Jury Trial – Constitution, Declaration of Rights, Art. 1, §20.

22) Minnesota : D.W.I. – M.S.A. §169.121
Jury Trial – Constitution, Bill of Rights, Art. 1, §6; *State v. Hatlestad*, 347 N.W.2d 843 (Minn. App. 1984).

23) Mississippi : D.W.I. – Code §63-11-30
Jury Trial – Code §9-9-33; *Clark v. State*, 332 So.2d 415 (Miss. 1976).

24) Missouri : D.W.I. – Annotated Missouri Statutes §577.010
Jury Trial – Constitution, Bill of Rights, Art. 1, §§22(A), (B); A.M.S. §546.040.

25) Montana : D.W.I. – M.C.A. §61-8-401
Jury Trial – Constitution, Declaration of Rights, Art. II, §26; M.C.A. §46-16-102; M.C.A. §§46-17-201 and 46-17-403 (Justice and City Court Jury Trial).

26) Nebraska : D.W.I. – Rev. Stat. of Nebraska §39-669.07
Jury Trial – R.S.N. §24-536 (trial by jury); *State v. Nielsen*, 199 Neb. 597, 260 N.W.2d 321 (1977); *State v. Soester*, 199 Neb. 477, 259 N.W.2d 921 (1977); *State v. Young*, 194 Neb. 544, 234 N.W.2d 196 (1975).

27) New Hampshire : D.W.I. – New Hampshire Rev. Stat. Ann. §265:82 and 265:82-b
Jury Trial – Constitution, Bill of Rights, Part 1, Art. 15; Jury trial allowed on *do novo* appeal to superior court. Cf., *State v. Handfield*, 115 NH 628, 348 A.2d 352, app. dismissed, 427 U.S. 909, 96 S.Ct. 3196, 49 L.Ed.2d 1201 (1976); R.S.A. 599:1; R.S.A. 606:8.

28) *New York : D.W.I. – Vehicle and Traffic Law §1192 (Volume 62A)
Jury Trial – Constitution, Bill of Rights, Art. 1, §2; Art. 6, §18; *People v. Dean*, 80 A.D.2d 695, 436 N.Y.S.2d 455 (1981).

29) North Carolina : D.W.I. – Gen. Stat. of North Carolina §20-138.1
Jury Trial – Constitution, Declaration of Rights, Art. 1, §24; Ch. 7A-196 (jury trials); *State v. Mack*, 81 N.C. App. 578, 345 S.E.2d 223 (1986).

30) North Dakota : D.W.I. – North Dakota Century Code §39-08-01
Jury Trial – Constitution, Declaration of Rights, Art. I, §13; *State v. Abrahamson*, 328 N.W.2d 213 (ND 1982); N.D.C.C. §40-18-15.

31) Ohio : D.W.I. – Ohio Revised Code §4511.19
Jury Trial – O.R.C. §2945.17; *City of Mentor v. Giordano*, 9 Ohio St.2d 140, 224 N.E.2d 343 (1967); Constitution, Bill of Rights, Art. 1, §10.

32) *Oklahoma : D.W.I. – Oklahoma Statutes Annotated 47 §11-902
Jury Trial – Constitution, Bill of Rights, Art. 2, §§19 and 20. *Bernhardt v. State*, 719 P.2d 832 (Okla. Cr. 1986).

33) *Oregon : D.W.I. – Oregon Revised Statutes §487.540
Jury Trial – *Brown v. Multnomah County Dist. Court*, 280 Or. 95, 570 P.2d 52 (1977).

34) *Pennsylvania : D.W.I. – Purdon's Pennsylvania Consolidated Statutes Ann. 75 Pa. C.S.A. §3731
Jury Trial – Constitution, Declaration of Rights, Art. 1, §§ 6 and 9; *Commonwealth v. Crum*, 523 A.2d 799 (Pa. Super. 1987).

35) *Rhode Island : D.W.I. – Gen. Laws of Rhode Island §31-27-2
Jury Trial – Constitution, Declaration of Rights, Art. 1, §10, *State v. Vinagro*, 433 A.2d 945 (R.I. 1981) (Jury Trial required for petty misdemeanor).

36) South Carolina : D.W.I. – Code §56-5-2930
Jury Trial – Constitution, Declaration of Rights, Art. I, §14; *State v. Gilliam*, 242 S.E.2d 410 (S.C. 1978) (Magistrate's Court); *State v. Dawkins*, 232 S.E.2d 228 (S.C. 1977) (Circuit Court).

37) *South Dakota : D.W.I. – S.D.C.L. §32-23-1
Jury Trial – *Parham v. Municipal Court, City of Sioux Falls*, 199 N.W.2d 501 (S.D. 1972); Constitution, Bill of Rights, Art. VI, §§ 6 and 7.

38) *Tennessee : D.W.I. – Tennessee Code Annotated §§ 55-10-401 and 55-10-403
Jury Trial – Constitution, Declaration of Rights, Art. 1, §§ 6 and 9; *State v. Morgan*, 598 S.W.2d 796 (Tenn. Crim. App. 1979).

39) *Texas : D.W.I. – Vernon's Ann. Civ. St. art. 6701L-1
Jury Trial – Constitution, Bill of Rights, Art. 1, §§ 10 and 15.

40) Utah : D.W.I. – Utah Code Annotated §41-6-44
Jury Trial – Constitution, Declaration of Rights, Art. 1, §§ 10 and 12; U.C.A. §78-46-5 (jury of 4); *Salt Lake City v. West Gallery, Inc.*, 573 P.2d 1283 (Utah 1978).

41) *Vermont : D.W.I. – Vermont Statutes Annotated T.23 §1201
Jury Trial – Constitution, Declaration of Rights, Chapter I, Arts. 10 and 12; *State v. Becker*, 287 A.2d 580 (Vt. 1972) (jury trial allowed for "noise in the nighttime" offense punishable by maximum $50 fine).

42) *Virginia : D.W.I. – Code §18.2-266
Jury Trial – Constitution, Bill of Rights, Art. I, §8; *Rodgers v. Commonwealth*, 197 Va. 527, 90 S.E.2d 257 (1955); *Gardner v. Commonwealth*, 195 Va. 945, 81 S.E.2d 614 (1954).

43) *Washington : D.W.I. – R.C.W.A. §§ 46.61.502 and 46.61.504
Jury Trial – Constitution, Declaration of Rights, Art. 1, §22; R.C.W.A. §3.66.010 (jury trial).

44)	West Virginia	: D.W.I. – Code §17C-5-2(d) Jury Trial – Constitution, Bill of Rights, Art. 3, §14; W.V.C. § 50-5-8; *Champ v. McGhee*, 270 S.E.2d 445 (WV 1980).
45)	Wisconsin	: D.W.I. – Wis. Stat. §§ 346.63(1) and 346.65 Jury Trial – Wis. Stat. §345.43.
46)	**Wyoming	: D.W.I. – Wyoming Statutes Annotated §31-5-233 Jury Trial – Constitution, Declaration of Rights, Art. 1, §§ 9 and 10; *City of Casper v. Cheatam*, 739 P.2d 1222 (Wyo. 1987); *Lapp v. City of Worland*, 612 P.2d 868 (Wyo. 1980).

NO JURY TRIAL

1)	Nevada	: Case at bar.
2)	Louisiana	: D.W.I. – L.S.A. – R.S. 14.98 Jury Trial – not available – L.S.A. C.Cr.P. art. 779.
3)	District of Columbia	: D.W.I. – Code §40-716 Jury Trial – not available – Code §16-705; *Alston v. United States*, 509 A.2d 1129 (D.C. App. 1986).
4)	New Mexico	: D.W.I. – NMSA §66-8-102 Jury Trial – not available – NMSA §34-8A-5; *Vallejos v. Barnhart*, 102 N.M. 438, 697 P.2d 121 (1985); *Hamilton v. Walker*, 65 N.M. 470, 340 P.2d 407 (1959).

5)	New Jersey	: D.W.I. – N.J.S.A. 39:4-50 Jury Trial – not available – N.J.S.A. 2C:1-4; *State v. Zoppi*, 483 A.2d 844 (N.J. Super. L. 1984).

FEDERAL STATUTE

18 U.S.C.A. §1	: 6 months incarceration and fine of $5000

APPENDIX "B"

Table 1.56

Criminal sanctions, administrative licensing actions, and related actions for driving while intoxicated offenses

By jurisdiction, as of Janury 1986

	Criminal Sanctions						Administrative licensing actions			Other actions		
Jurisdiction	Term of imprisonment	Mandatory minimum Term of imprisonment	Fine	Mandatory minimum fine	Community service	Restitution	Pre-conviction licensing action	Suspension or revocation	Mandatory minimum term of withdrawal	Alcohol education or treatment program	Education or treatment program as alternative to sanctions	Vehicle impoundment confiscation
Alabama	S	S[a]	S		S[a]	(b)	S[a]	S	S	S		
Alaska	S	S	S		S	S	S	S		S		S
Arizona	S	S	S	S	S	(b)	S	S	S	S		
Arkansas	S		S		S			S	S	S		S
California	S	S	S	S		(b)		S	S	S		S
Colorado	S	S[a]	S		S		(c)	S	S[d]	S	S	
Connecticut	S	S	S		S	S	(e)	S	S	S	S	
Delaware	S	(f)	S			S	S	S	S	S		S[g]
District of Columbia	S		S				S	S	S			
Florida	S	S[a]	S		S			S	S[h]	S		
Georgia	S	S[a]	S		S[a]			S	S	S		
Hawaii	S	S[a]	S		S			S	S	S		
Idaho	S	S[a]	S			(b)	S	S	S[a]	S		
Illinois	S	S[a]	S		S[a]	S	S	S				
Indiana	S	S[a]	S		S[a]		S	S	S	S[a]	S[a]	
Iowa	S	S[a]	S	S	S[a]	S	S	S		S[a]		
Kansas	S	S	S		S[a]	S		S	S	S		
Kentucky	S	S[a]	S		S[a]	S	S	S	S	S	S	
Louisiana	S	S[a]	S				S	S	S[a]	S	S	
Maine	S	S	S	S			S	S			(l)	
Maryland	S	S[a]	S		S[a]	S		S		S	S	
Massachusetts	S	S[a]	S		S			S	S	S	S[m]	

Jurisdiction	Criminal Sanctions						Administrative licensing actions			Other actions		
	Term of imprisonment	Mandatory minimum Term of imprisonment	Fine	Mandatory minimum fine	Community service	Restitution	Pre-conviction licensing action	Suspension or revocation	Mandatory minimum term of withdrawal	Alcohol education or treatment program	Education or treatment program as alternative to sanctions	Vehicle impoundment confiscation
Michigan	S		S		S	S		S	S	S		
Minnesota	S		S			S	S	S	(n)	S		
Mississippi	S	(o)	S	S	S		S	S	S	S		
Missouri	S	S	S		S	S	S	S	S	S		
Montana	S	S	S					S	S	S	S	
Nebraska	S	S	S					S	S	S		
Nevada	S	S	S		S	S	S	S	S	S	S	
New Hampshire	S	S	S	S†				S	S	S		
New Jersey	S	S	S		S			S	S	S		
New Mexico	S	S	S			S	S	S	S	S		
New York	S		S	S			S	S	S	S	S	
North Carolina	S	S	S		S		S	S	S			(g)
North Dakota	S	S	S	S	S	S	S	S	S	S		
Ohio	S	S	S				S	S	S	S	S	
Oklahoma	S		S		S	S	S	S	S	S		
Oregon	S	S	S		S		S	S	S	S	S	S
Pennsylvania	S	S	S	S	S	S		S	S	S	S	
Puerto Rico			S					S		S	S	
Rhode Island	S	S	S	S	S	S	S	S	S	S		
South Carolina	S	S	S	S	S			S	S	S	S	
South Dakota	S		S			S		S	S			
Tennessee	S	S	S	S	S	S	S	S	S	S		
Texas	S	S	S		S			S		S		S
Utah	S	S	S	S	S	S	S	S	S	S		
Vermont	S	S	S		S			S	S	S		
Virginia	S	S	S					S	S	S	(n)	
Washington	S	S	S	S		S		S	S	S		
West Virginia	S	S	S	S			S	S		S	(y)	
Wisconsin	S		S			S	S	S	S	S		S
Wyoming	S	S	S				S	S	S	S	S	

Note: See Note, table 1.53. "The sanctions listed for convictions of alcohol driving offenses. . .are those specified by statute. If a sanction is not specified by law. . ., it is not listed" (U.S. Department of Transportation, National Highway Traffic Safety Administration, Digest of State Alcohol-Highway Safety Related Legislation, January 1983 (Washington, D.C.: U.S. Department of Transportation, 1983), (pp. 1, 2)). "Term of imprisonment" refers to both jail sentences and prison sentences. " The term 'mandatory sanction' means either a criminal sanction or an administrative licensing action which must be imposed by either a court or administrative agency" (Source, p. 1-1). "Pre-conviction licensing action" refers to provisions which enable the State licensing agency to suspend a license prior to conviction based on blood alcohol concentration level. "Mandatory minimum term of withdrawal" refers to a mandatory minimum term of either license suspension or revocation. Because of variation among the jurisdictions within categories of sanctions, e.g., terms of imprisonment or amounts of fines, the Source document as well as individual jurisdictions' statutes should be consulted. In the table, "S" indicates that such a provision is provided expressly by statute. Statutes should be consulted for the full text and meaning of specific provisions.

[a] Not for first offense but may apply to second and/or subsequent offenses.

[b] May be required where involved in accident causing damages, injury, or death.

[c] Administrative per se with a blood concentration level of 0.15 percent; the period of license revocation is 1 year.

[d] Where there has been a previous conviction or if defendant is under 21 years of ago.

[e] Police may take and hold a drivers' license for 24 hours if the driver has a blood alcohol concentration level of 0.10 percent or more.

[f] These minimum sanctions may not be suspended by the Court; the law is silent as to prohibiting the Court from placing a person on probation.

[g] Yes, but only if convicted of driving with suspended or revoked license.

[h] First offense only.

[i] In lieu of fine.

[j] In lieu of imprisonment for first offense and in lieu of fine for second and subsequent offenses.

[k] In lieu of fine or imprisonment except for injury related driving while intoxicated offenses.

[l] After two-thirds of license suspension period has passed, offender may be issued a license if they have completed an alcohol education/treatment program. Special provisions apply.

[m] If defendant consents.

[n] A limited license may be issued for employment purposes or attendance at an alcohol treatment program.

[o] The law does not specifically prohibit suspending or placing persons on probation for the minimum imprisonment term.

[p] In lieu of imprisonment.

[q] Applies to all offenses, however, injury must have been intentionally inflicted for the victim to be compensated.

[r] Administrative per se with a blood alcohol concentration level of 0.13 percent; the period of revocation varies with number and type of alcohol related convictions.

[s] Except for the driving while intoxicated death or bodily injury offense.

[t] Where there is serious bodily injury or a 0.20 percent blood alcohol level.

[u] To be paid by the defendant if a sentence is either suspended or deferred.

[v] Where there has been a previous conviction. Also, license may be seized if the blood alcohol concentration level is 0.10 percent or above.

[w] May be imposed if defendant is an alcoholic or suffering from acute alcohol intoxication.

[x] Administrative per se with a blood alcohol concentration of 0.08 percent.

[y] Generally no; but there are limited alternatives.

Sources: U.S. Department of Transportation, National Highway Traffic Safety Administration, Digest of State Alcohol-Highway Safety Related Legislation, 4th ed., March 1986 (Washington, DC: U.S. Department of Transportation, 1986), pp. 3-1–3-379. Table adapted by SOURCEBOOK staff.

APPENDIX "C"
METHOD OF MISDEMEANOR DISPOSITION IN REPORTING STATE TRIAL COURTS IN 1985[1]

State and Court	Jurisdiction	Total dispositions	Trial	
			Jury	Nonjury
Alaska:				
District	L	25,689[j]	442[j]	239[j]
Arizona:				
Municipal	L	100,587	232	4,186
Justice of the Peace	L	29,861	7	2,079
California:				
Municipal	L	541,614[j]	3,512[j]	6,129[j]
Justice	L	43,461[j]	337[j]	1,657[j]
Colorado:				
County	L	29,788[j]	294[j]	787[j]
Connecticut:				
Superior	G	116,916[j]	229[j]	523[j]
Delaware:				
Superior	G	4,142[j]	340[j]	36
Court of Common Pleas	L	14,909	103[a]	N/A
Florida:				
Circuit	G	160,112[j]	3,123[j]	618[j]
County	L	239,754	1,023	5,461
Hawaii:				
Circuit	G	207[i]	317[j]	165[j]
District	L	24,450[i]	N/A	N/A

[1] Statistics provided by "The Court Statistics and Information Management Project of the National Center for State Courts, 1988." 300 Newport Avenue, Williamsburg, Virginia 23187-8798.

State and Court	Jurisdiction	Total dispositions	Trial	
			Jury	Nonjury
Idaho:				
District	G	34,258[j]	N/A	N/A
Indiana:				
Superior and Circuit	G	18,171[ij]	14[ij]	399[ij]
	(County Court function)		11[j]	938[j]
City and Town	L	26,856[ij]	N/A	5,752[ij]
Municipal Court of Marion Cty	L	44,831[j]	73[j]	18,469[j]
County	L	38,533[ij]	94[ij]	2,449[ij]
Kansas:				
District	G	16,250[j]	207[j]	548[j]
Michigan:				
Circuit	G	43,619[j]	2,312[j]	2,273[j]
District	L	187,220[ij]	1,608[ij]	7,939[ij]
Municipal	L	1,949[ij]	2[ij]	389[ij]
Missouri:				
Circuit	G	2,438 (circuit judges)	182	707
		58,772 (Assoc. circuit judges)	N/A	3,995
North Carolina:				
Superior	G	30,366[j]	1,456[j]	N/A
Ohio:				
Municipal	L	260,751[j]	760[j]	10,201[j]
County	L	24,309[j]	125[j]	1,841[j]
Oklahoma:				
District	G	29,631[j]	183[j]	862[j]

State and Court	Jurisdiction	Total dispositions	Trial	
			Jury	Nonjury
Pennsylvania:				
Court of Common Pleas	G	91,482[j]	3,571[j]	6,034[j]
District Justice	L	298,574[j]	N/A	51,533[j]
South Carolina:				
Magistrate	L	104,788	233[j]	59,488[j]
South Dakota:				
Circuit	G	13,736[ij]	115[ij]	105[ij]
Texas:				
District	G	12,666	41	29[j]
Municipal	L	350,699[j]	764[j]	102,450[j]
Justice of the Peace	L	347,822[j]	591[j]	40,244[j]
County-Level	L	222,870[j]	2,236[j]	2,598[j]
Utah:				
District	G	3,716[j]	276[j]	100[j]
Circuit	L	28,974[ij]	361[j]	5,550[j]
Justice of the Peace	L	34,399	23	1,724
Vermont:				
District	G	17,335[j]	203	97[j]
Virginia:				
Circuit	G	23,322[j]	758	6,750
West Virginia:				
Circuit	G	1,872	67	N/A
Wisconsin:				
Circuit	G	29,869	297	343
District of Columbia:				
Superior	G	22,943	694	571
Puerto Rico:				
Superior		7,773[j]	61	1,734[j]
District		37,830	N/A	1,829[j]

Footnotes:

N/A = Data are not available.

[a] Court Jurisdiction:
Delaware – Court of Common Pleas – Jury trials are not handled in the New Castle County Court of Common Pleas; jury trials for criminal cases are held in Kent and Sussex Counties. If a jury demand is made in New Castle County, the case is transferred to the Superior Court.

[i] Data are incomplete:
Colorado – County Court – Data do not include figures from Denver County Court (2nd District).
Hawaii – Circuit Court – Criminal data do not include reopened prior cases included in the unclassified civil category.
– District Court – Misdemeanor data do not include some criminal cases that could not be separated from the ordinance violation cases.
Indiana – Superior and Circuit Court – There were 13,546 dispositions that could not be identified by case type and are not include in these data.
These cases include matters where an adjudication is made, but the formalities of a trial are not involved.
– City and Town Court – There were 1,153 disposed cases that were not identified by category. These figures are not included in these data.
Total trial data do not include jury figures.
– County Court – There are 3,814 disposed cases that could not be identified by case type and are not included in these data. These cases include matters where an adjudication is made, but the formalities of a trial are not involved.
Michigan – District Court – Figures do not include data from the City of Dearborn. Two other courts did not report data for the entire year.
– Municipal Court – Municipal courts for Grosse Pointe Municipal and Grosse Pointe Shores did not report data.
South Carolina – Magistrate Court – Data do not include acquittals.
South Dakota – Circuit Court – Misdemeanor data do not include Class 2 misdemeanors or Class 1 preliminary hearings.
Texas – District Court – Nonjury criminal trial data do not include guilty pleas accepted during a bench trial.
– Municipal Court – Data represent 7,473 reports out of a possible 10,092 (reporting rate of 74 percent).
– Justice of the Peace Court – Data represent 8,428 Justice of the Peace Court monthly reports out of a possible 11,616; a reporting rate of 73 percent.
Utah – Circuit Court – Felony/misdemeanor disposed data do not include criminal traffic cases.

[j] Explanation of data:
Alaska – District Court – Misdemeanor data include ordinance violation, misdemeanor traffic cases and DWI/DUI cases.
California – Municipal Court – Misdemeanor data include some ordinance violation cases.
– Justice Court – Misdemeanor data include some ordinance violation cases.
Colorado – County Court – Misdemeanor data include de novo criminal appeals.
Connecticut – Superior Court – Felony/misdemeanor data include Part D felony cases and ordinance violation cases.
Delaware – Superior Court – Felony/misdemeanor disposed data include appeals that are tried do novo.
Florida – Circuit Court – Felony/misdemeanor data include DWI/DUI and miscellaneous criminal cases. All defendants were charged with at least one felony, but may also be charged with misdemeanors, DWI/DUI and miscellaneous criminal violations.
Hawaii – Circuit Court – Misdemeanor data include felony cases.
Idaho – District Court – Misdemeanor data include ordinance violation cases.
Indiana – Superior and Circuit Court – Misdemeanor data include DWI/DUI cases.
– City Court and Town Court – Misdemeanor data include DWI/DUI cases.
– Municipal Court of Marion County – Misdemeanor data include DWI/DUI cases.
– County Court – Misdemeanor data include DWI/DUI cases.
Kansas – District Court – Misdemeanor data include appeal cases from the lower courts.
Michigan Circuit Court – Felony/misdemeanor data include 3rd offense DWI/DUI cases.
– District Court – Misdemeanor data include ordinance violations.
– Municipal court – Misdemeanor data include ordinance violation cases.
North Carolina – Superior Court – Misdemeanor data include criminal appeal disposed cases.

Ohio – Municipal Court – Misdemeanor data include appeal and ordinance violation cases.
- County Court – Misdemeanor data include criminal appeals and ordinance violation cases.

Oklahoma – District Court – Misdemeanor data include some miscellaneous criminal, all criminal appeal, and all ordinance violation cases.

Pennsylvania – Court of Common Pleas – Felony/misdemeanor data include DWI/DUI and criminal appeal cases.
- District Justice Court – Triable misdemeanor data include ordinance violation cases.

South Carolina – Magistrate Court – Data include jury acquittals.

South Dakota – Circuit Court – Misdemeanor data include some criminal appeals cases. Misdemeanor disposed data include DWI/DUI disposed cases.

Texas – District Court – Pretrial guilty pleas include those received during bench trials. In addition to jury and nonjury trials, there were also 6 directed verdicts which are not reflected in the total.
- County Level Court – Misdemeanor disposed data include criminal and other criminal appeals cases. Data also include criminal and traffic appeals cases from the lower courts in Dallas County. In addition to jury and nonjury trials, there were also 58 directed verdicts which are not reflected in the total.

Utah District Court – Felony/misdemeanor data include criminal appeals cases.
- Circuit Court – Felony/misdemeanor data include some miscellaneous criminal cases.

Vermont – District Court – Misdemeanor data include ordinance violation cases and DWI/DUI cases.

Virginia – Circuit Court – Misdemeanor data include criminal appeals and ordinance violation cases.

Puerto Rico – Superior Court – Appeals of trial court cases are included according to the case type for caseload inventories, trial and disposition data.
- District Court – Misdemeanor data include ordinance violation cases.

APPENDIX "D"

DWI/DUI Jury Trials in State Trial Courts, 1985[1]

State/Court	Jurisdiction	DWI/DUI Cases Disposed	Number of Cases Disposed by Jury Trial	Percentage of Cases Disposed by Jury Trial
HAWAII				
Circuit Court[2]	G	22	1	4.5%
IDAHO				
District Court	G	14,201	1,374 (includes Bench trials)	9.7%
KANSAS				
District Court	G	4,828	79	1.6%
OHIO				
Municipal Court	L	83,923	567	.7%
County Court	L	13,993	85	.6%
OKLAHOMA				
District Court	G	15,447	96	.6%
TEXAS				
District Court	G	3,530 (more than first offense)	37	1%
County-Level	L	149,330	1,259	.8%
UTAH				
Circuit Court	L	6,990	91	1.3%
Justice of the Peace	L	4,909	80	1.6%
WEST VIRGINIA				
Circuit Court	G	311	16	5.1%
WISCONSIN	G	13,517	323	2.4%

[1] Statistics provided by "The Court Statistics and Information Management Project of the National Center for State Courts, 1988." 300 Newport Avenue, Williamsburg, Virginia 23187-8798.

[2] Clearly under-reported.

(9)

Supreme Court, U.S.
FILED
SEP 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE RESPONDENT

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25 pd

QUESTION PRESENTED

Whether this court should affirm the Nevada Supreme Court decision denying jury trials to persons charged with misdemeanor Driving Under the Influence (DUI) offenses in the municipal courts of the State of Nevada for lack of a Constitutional right to a trial by jury in view of the long-standing threshold between "petty" and "serious" offenses where the maximum authorized penalty is six months in jail?

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STATEMENT OF THE CASE

Respondent makes the following statement deemed necessary to correct an omission and an inaccuracy in the Petitioners' Statement of the Case.

The result of the laboratory analysis on Petitioner Blanton's blood sample drawn at the time of his arrest was 0.17 per cent by weight of blood alcohol.

Nevada Revised Statute 266.550, cited in Brief for Petitioners, page 4, does not apply to Nevada cities such as Respondent which are incorporated by special charter by the Nevada Legislature. *See* the opinion below, Appendix to Petition for Writ of Certiorari, Tab "A", pages 12-16; also see NRS 266.005 set out verbatim on page 14 thereof.

SUMMARY OF ARGUMENT

This Court should affirm the decision of the Supreme Court of Nevada. The Nevada Supreme Court decision denying jury trials for misdemeanor DUI offenses in Nevada where the maximum authorized penalty is six months in jail and a $1000 fine is in accord with pronouncements from this Court during the past twenty years defining a petty offense as one subject to no more than a six month jail sentence.

The argument that certain minimum mandatory punishment provisions, together with various collateral consequences, elevate an otherwise petty offense into a serious offense mandating a jury trial right is without merit. Minimum mandatory punishment is not relevant

to the test enunciated by this Court as the "maximum authorized penalty" for an offense. Although a "floor" of punishment has been established for DUI in Nevada, the "ceiling" remains at six months in jail and/or a $1,000 fine. Moreover, collateral consequences likewise do not affect the standard applied to the jury trial question; the threshold remains at six months in jail.

Petitioners attempt to revive a half-century old test, the "nature of the offense", to determine when a jury trial is mandated by the U.S. Constitution, citing two decisions of this Court from 1930 and 1937. This standard has been abandoned, however, as its absence from recent opinions of this Court would indicate. Petitioners also claim that a majority of states permit jury trials in DUI cases and thereby Nevada is compelled under the Constitution to comply with this "national standard" which regards it as a serious offense dictating a jury trial right.

A decision rendered last year by the Court, and cited this spring by the Fifth Circuit Court of Appeals, *en banc*, held that although an overwhelming majority of states provide a criminal procedural right, other states are not required by the Constitution to do likewise in areas of law left to the states to regulate, such as the task of defining criminal laws. An appeal was rejected last year by this Court where it was requested to review the identical issue presented by Petitioners for want of a substantial federal question. No new arguments or significant authorities arising since that decision have been cited by Petitioners.

The Ninth Circuit Court of Appeals has rendered decisions which on their face appear to conflict with the

Nevada Supreme Court decision in this case. However, the Fifth Circuit *en banc* opinion referred to above, explains, *inter alia*, why those Ninth Circuit decisions are an anomaly and contradict firmly established principles enunciated by this Court regarding when the right to a jury trial attaches.

ARGUMENT

A basic principle of law deeply rooted in the historical practice of the Colonies and the original thirteen states declares that, under the Constitution, no person is entitled to a trial by jury for a petty offense. *Baldwin v. New York*, 399 U.S. 66 (1969). This Court has refined, through a series of decisions emanating with *Duncan v. Louisiana*, 391 U.S. 145 (1968), a clear-cut definition of "petty offense": an offense which is subject to a maximum term of incarceration of six months or less. *Baldwin, supra; Frank v. United States*, 395 U.S. 147 (1969); *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974).

I. MISDEMEANOR DUI VIOLATIONS IN NEVADA ARE PETTY OFFENSES UNDER FEDERAL CONSTITUTIONAL LAW AND PETITIONERS ARE NOT ENTITLED TO TRIALS BY JURY.

A review of United States Constitutional provisions and Supreme Court case decisions is necessary for a complete understanding of the issues involved with the DUI jury trial question. Article III, Section 2, paragraph 3 of the United States Constitution states that:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . "

This language was later supplemented by the Sixth Amendment which provides that:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . "

On its face, the Constitution would seem to impose the right of trial by jury in all federal criminal cases, bearing in mind that Article III deals only with the federal government and federal crimes. Despite this language, however, the Supreme Court of the United States as the ultimate authority on the meaning of the Constitution, decided as early as 1888, in *Callan v. Wilson*, 127 U.S. 540, that the language in the Constitution must be viewed in light of the times in which it was written. Thus, this Court has consistently held that the right to a jury trial was never intended to apply to those crimes which were considered to be "petty offenses" at common law. The Court has on numerous occasions reiterated this distinction between "petty" and "serious" offenses and has extended the concept to statutory crimes. *Cheff v. Schackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Schick v. United States*, 195 U.S. 65 (1904); *Natal v. Louisiana*, 139 U.S. 621 (1891).

In the landmark case of *Duncan v. Louisiana*, 391 U.S. 145 (1968), when the Court held that, by virtue of the Fourteenth Amendment, the Sixth Amendment right to trial by jury also applied to state criminal proceedings, this Court restated its position with regard to the limitations between "serious" and "petty" offenses.

. . . It is doubtless true that there is a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States . . . the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not- . . . The penalty authorized by the law of the locality may be taken "as a gauge of its social and ethical judgment," . . . of the crime in question.

. . . So-called petty offenses were tried without juries both in England and in the Colonies and have always been exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions. There is no substantial evidence that the Framers intended to depart from this established commonlaw practice, and the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications . . . in the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass on the validity of the legislative attempts to exempt from jury trial, or where the legislature has not addressed itself to the problem, themselves face the questions in the first instance . . .

In determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial, we are counseled by *District of Columbia v. Clawans, supra*, to refer to objective criteria, chiefly the existing laws and practices in the Nation. 391 U.S. at 159-161.

The *Duncan* Court then went on to note that both at common law and in federal statutes, the dividing line between "petty" and "serious" offenses was a maximum jail sentence of six months. The Court also indicated, in

footnote 35, that with the exception of criminal contempt offenses, the relevant penalty to be considered was the possible ma imum sentence which could be imposed, not the actual sentence levied against the defendant.

Subsequent to *Duncan*, the Court has written several decisions which clarify the manner in which a crime is to be classified as "petty" or "serious" and stress that the amount of jail time which could be imposed is to be considered the almost exclusive factor in making such a determination. The first of these cases is *Frank v. United States*, 395 U.S. 147 (1969). *Frank* dealt with a criminal contempt charge arising out of the violation of an administrative ruling. The Court analyzed the test for deciding whether or not a jury trial is warranted.

> In determining whether a particular offense can be classified as 'petty', this Court has sought objective indications of the seriousness with which society regards the offense. *District of Columbia v. Clawans, supra*, at 628, 57 S.Ct. at 663. The most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission . . .
>
> In ordinary criminal prosecutions, the severity of the penalty authorized, not the penalty actually imposed, is the relevant criterion. In such cases, the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense. See *Duncan v. Louisiana, supra*, at 162, 88 S.Ct. at 1454, n.35. *Frank*, at 395 U.S. 148-149.

Frank also held that collateral consequences of a conviction, if contemplated within the definition of "petty" by the legislature, would not remove an offense from the "petty" category. Thus the Court in *Frank* rejected the claim that a three year sentence of probation made an otherwise "petty" offense a "serious" one for purpose of

a jury trial and noted that: "Probation is, of course, a significant infringement of personal freedom, but it is certainly less onerous a restraint than jail itself." *Frank, supra*, at 151.

The next major federal case dealing with jury trials is *Baldwin v. New York*, 399 U.S. 66 (1970). In *Baldwin*, the defendant was charged with a crime which was punishable by up to one year imprisonment and which by statute could not be tried by jury. It was in *Baldwin* that the Court established the outer limit for the dividing line between "petty" and "serious" crimes. Any offense which carried a penalty in excess of six months in jail would be "serious"; those offenses where the maximum jail term did not exceed six months would be "petty". The Court made no mention of other factors, such as the amount of the fine, except to briefly refer to the $500.00 fine limit contained in the federal definition of "petty" under 18 U.S.C. § 1. The majority of the opinion centers around the issue of imprisonment and the need for objective criteria to make a determination.

> . . . This near-uniform judgment of the Nation [that any jail time over six months removes a crime from the 'petty' offense category] furnishes us with the only objective criterion by which a line could ever be drawn–on the basis of the possible penalty alone-between offenses that are and that are not regarded as 'serious' for purposes of trial by jury.
>
> Of necessity, the task of drawing a line "requires attaching different consequences to events which, when they lie near the line, actually differ very little." *Duncan v. Louisiana, supra*, at 161, 88 S. Ct., at 1453. One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that face

him, and the consequences that faced the appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six month's imprisonment, we have held that these disadvantages, onerous as they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications. *Baldwin*, at 399 U.S. 72-73.

As recently as April of 1987 this Court dismissed an appeal for want of a substantial federal question in *Bairnsfather v. Louisiana*, ___ U.S. ___, 107 S.Ct. 1620, 95 L.Ed.2d 195 (April 6, 1987), which offered the same issue for review put forth by Petitioners herein. Bairnsfather requested a jury trial when he was charged in the Louisiana courts with second offense Driving While Intoxicated (DWI), mandating a thirty day to six month jail sentence and a mandatory $300 to $500 fine. Bairnsfather presented essentially the same issues and arguments as Petitioners do in support of their contention that they are entitled to a jury trial under the Sixth Amendment. The thrust of the argument is that certain collateral consequences attendant to a DWI conviction, along with a minimum mandatory punishment, elevate a "petty" offense into a "serious" offense requiring a jury trial under the Constitution. See *Landry v. Hoepfner*, 840 F.2d 1201, 1210-1211 (5th Cir. *en banc* 1988).

Petitioners advanced no new arguments or significant authorities arising since the Court dismissed the *Bairnsfather* Appeal to convince this Court to reverse the opinion below by the Nevada Supreme Court. Moreover,

. . . by dismissing the appeal for want of a substantial federal question, the Supreme Court in *Bairnsfather* did reach and so resolve the substantive merits of the appeal, ... *Bairnsfather* is thus a ruling on the merits with precedential value, albeit with less such value than an opinion of the Court after full briefing and argument. [Citations omitted.] *Id.*, at 1212.

In *Landry, supra*, the Fifth Circuit Court of Appeals, en banc, on March 17, 1988, reversed a decision of one of its panels, *Landry v. Hoepfner*, 818 F.2d 1169 (5th Cir. 1987) and held that the United States Constitution does not require the states to provide the right of trial by jury for a first offense DWI. While noting that the maximum penalty prescribed was six months in jail and a five hundred dollar fine, the Fifth Circuit found that this " . . . does not exceed that appropriate for 'petty' offenses under *Baldwin v. New York*, ..." *Landry, supra*, at 840 F.2d 1202.

Most importantly, the Fifth Circuit declared that the United States Supreme Court . . .

> . . . has *never* held or stated any crime is a "serious" rather than a "petty" offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law. Otherwise put, the Court has never identified *any particular offense* as being nonpetty which was both not indictable at common law and carried a maximum authorized confinement of not more than six months. [Emphasis original for "never"; emphasis added for phrase *"any particular offense"*]. *Id.*, at 1209.

Hence, the Petitioners' contention that certain minimum mandatory punishment, which is well under six months in jail, combined with various collateral consequences such as driver license revocation, social stigma, and

increased insurance premiums, elevate a DUI from an otherwise petty offense into a serious offense allowing a right to a jury trial is without merit. The law in this area has been settled by this Court for at least twenty years and Petitioners present no compelling argument to change the well-defined standard of when a Constitutional right to trial by jury arises. The "bright-line" test enunciated by *Baldwin* has proven to be a practical standard which is easily applied in a uniform manner throughout the United States.

II. THE BRIEF FOR PETITIONERS FAILS TO PROVIDE A CLEAR AND CONVINCING RATIONALE FOR CREATING A JURY TRIAL RIGHT UNDER THE CONSTITUTION FOR DUI OFFENSES.

Petitioners suggest that the Nation, as a whole, has passed judgment on the offense of DUI, labeling it a "serious" offense requiring the right to a jury trial. It is proffered that a need exists for national uniformity with regard to trial procedure for DUI offenders. Brief for Petitioners, pages 17-18. The Petitioners also maintain that the "nature of the offense" of DUI has become such that the crime is now "serious" in the Constitutional context of jury trial right. Brief for Petitioners, pages 18-22. Certain minimum mandatory punishment provisions under the Nevada DUI law, together with various collateral consequences, are used by Petitioners to argue that such items somehow elevate DUI out of the petty offense category and into the Constitutional realm of serious offense compelling a jury trial right.

As noted in the citation from *Landry* above, this Court has never identified any particular offense which was both not indictable at common law and carried no more than a six month term as its maximum authorized period of incarceration as a "serious" offense mandating a right to jury trial under the Constitution.

Petitioners propose by their argument that this Court ignore case precedent for this offense only and carve out a new order for drunk drivers. The justification offered for such a proposal is based on the treatment accorded to drunk drivers by society in recent times to single out DUI offenders for special enforcement and certain minimum mandatory punishment.

A. Neither the nature of DUI nor a "national standard" create a jury trial right under the Constitution.

1. The Nature of the Offense Test

Petitioners place great reliance on *District of Columbia v. Colts*, 282 U.S. 63 (1930) and on *District of Columbia v. Clawans*, 300 U.S. 617 (1937) for the application of the "nature of the offense" standard to this case in order to determine that a jury trial right arises under the Constitution. Petitioners ask the Court to rejuvenate a test utilized a half-century ago in *Colts* and since abandoned.

No weight is accorded to this test in *Duncan* or *Baldwin*, where the only jury trial standard referred to is the maximum authorized penalty, chiefly the maximum period of possible confinement. *Landry, supra*, at 1215. See also *Matos v. Rodriguez*, 440 F.Supp. 673, 676 (D. P.R. 1976) wherein the Court declared that the nature of the offense

argument found in *Colts* and *Clawans* is now inapposite. The Nevada Supreme Court, in the opinion below, adopted this criticism of *Colts* by citing *Matos* and holding that the nature of the offense test is no longer applicable. *Blanton v. North Las Vegas Municipal Court*, 748 P.2d 494, 503 (1987). In *United States v. Floyd*, 345 F.Supp. 283, 287 (W.D. Okla. 1972), *cert. denied*, 414 U.S. 1044, the Court noted that *Colts* was decided before Congress enacted the petty offense classification found in 18 U.S.C. section 1 (repealed as of October 31, 1987, with enactment of the new Federal Sentencing Guideline by the United States Sentencing Commission) which had defined a petty offense as any misdemeanor where the penalty does not exceed six months in jail and/or a $500 fine.

Further support for Respondent's position can be found in *Frank, supra*:

> In determining whether a particular offense can be classified as "petty", this Court has sought objective indications of the seriousness with which society regards the offense. . . . The most relevant indication . . . is the severity of the penalty authorized for its commission. 395 U.S. at 148.

The Court also noted in *Baldwin* that " . . . we have sought objective criteria . . . and we have found the most relevant such criteria in the severity of the maximum authorized penalty." *Baldwin, supra*, 399 U.S. at 68.

Petitioners seek to establish an exception to the rule whereby courts apply subjective criteria, such as collateral consequences of a conviction, or the "nature of the offense", to determine the seriousness of an offense on an *ad hoc* basis. The result would produce judicial opinions

driven by the personal predilictions of the jurist authoring such an opinion. In *Landry, supra*, the Fifth Circuit was mindful of this potential dilemma and instructed against utilizing any criteria other than whether the offense was indictable at common law and whether its maximum authorized penalty exceeds the bright-line test of *Baldwin*.

> These two criteria make for a brightline, objective test. To add a third criterion - the judicial perception of the "seriousness" *otherwise* of the offense, either intrinsically or as the judges conceive the "public" to generally regard it apart from the status it had at common law and its current maximum penalty - is to inject an inherently and inescapably subjective and imprecise factor into the calculus. Essentially, this would involve judges in applying the same sort of criteria that the legislative branch did in the first place when it fixed the maximum sentence. [Emphasis original]. *Landry, supra*, at 1209.

Moreover, if this Court were to back-track and revitalize the nature of the offense test, as used in *Colts* (a 1930 case concerning a Reckless Driving offense where the defendant was charged with driving at a speed greater than 22 miles per hour, recklessly), a Pandora's box of problems in applying such a standard would follow. For example, is Petit Larceny or Reckless Driving "serious", or *malum in se*, giving rise to a right to trial by jury? Language from *Colts, supra*, at 282 U.S 73, indicates that Reckless Driving is *malum in se* and therefore "serious"; would a decision from this Court in favor of Petitioners require jury trials on demand for every reckless driver? *Baldwin* and *Frank* counsel against this approach.

In *Landry*, the Fifth Circuit emphasized the point that this Court has refined the determination of when an offense is petty or serious, and therefore when a Constitutional right to a jury trial attaches: "Since Baldwin, the Court has spoken *only* in terms of the length of possible confinement as establishing the dividing line between 'petty' and serious offenses." [Emphasis original]. *Landry v. Hoepfner*, 840 F.2d at 1208. Therefore, Petitioners' reliance on certain collateral consequences, minimum mandatory punishment, and the nature of the offense, is misplaced. Their argument runs contrary to a long line of decisions by the Court that the determinative factor is the maximum authorized period of confinement. See *Landry, supra*, at 1215-1216. See also *Duncan, supra; Baldwin, supra; Frank, supra; Codispoti, supra*.

Again, in *Landry*, the Fifth Circuit declared the following with reference to dismissal by this Court of the *Bairnsfather* appeal last year for want of a substantial federal question: "Clearly there is nothing in *Bairnsfather* which is in tension with or breaks new ground respecting *Duncan, Frank, Baldwin*, or *Codispoti*." *Id.*, at 1212.

The Nevada Supreme Court decision in *Blanton, supra*, strictly follows the principles delineated in the above cases from this Court. The opinion (reprinted in full in Appendix "A" to the Petition for Writ of Certiorari) draws heavily from *Baldwin* and concludes that the federal constitution does not require it to overturn the decision in *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983), which held that ". . . under the statutory penalties for DUI in Nevada, the United States Constitution does not guarantee the right to jury trials in misdemeanor DUI

cases." (Appendix "A" to the Petition, page 32; also found at 748 P.2d at 501).

2. The "National Standard" Test

Lower courts and Petitioners have taken *Baldwin* out of context. For example, the "national standards" language of Baldwin has been referred to by Petitioners (see Brief for Petitioners, pages 7-8, 11-13, and 17-18) and by the Ninth Circuit in some opinions as supporting grounds for the granting of jury trials in DUI cases. See *United States v. Craner*, 652 F.2d 23, 27 (9th Cir. 1981). The reasoning stated is that since the majority of states do grant a defendant a jury trial for DUI offenses, then this is a reflection by the "nation" that the offense is a serious one. However, while many states do allow for jury trials in DUI cases, they also allow jury trials in most misdemeanor cases, that is, in cases where the penalty does not exceed six months in jail. Those states which punish DUI by penalties which do not exceed the six month standard still consider the offense as "petty". These states have not redefined "petty"; instead, they have simply determined that jury trials should be granted in all crimes, petty or not, either because their state constitutions require jury trials in all criminal matters and are broader in scope than the federal constitution, or because state legislatures have enacted statutes providing for jury trials in petty offense cases. For example, see *Bronson v. Swinney*, 648 F.Supp. 1094, 1098 (D. Nev. 1986), (appeal pending, 9th Cir.) where in footnote 2 that Court cites *Craner* as counting seven states within the Ninth Circuit which grant jury trials by state constitution or by state statute and only one, Hawaii, which does so by a ruling from the Hawaii

Supreme Court. Nationally, the standard for defining "petty" offense still turns primarily on the maximum possible jail sentence and the six month rule. *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974); *Taylor v. Hayes*, 418 U.S. 488 (1974).

Moreover, many states, perhaps 21 by Petitioners' count (see Brief for Petitioners, pages 12-13), provide for a maximum jail term of one year or more for DUI violations. Hence, Petitioners' rationale that DUI is a serious crime in that jury trials are provided for DUI offenders by a majority of states becomes a boot-strapped argument. The law is clear that a right to jury trial is mandated where the maximum authorized term of incarceration exceeds six months. *Baldwin, supra*. To argue that 21 states make DUI punishable by one year, and therefore it is "serious", so that if other states punish it by six months, they shall provide a jury trial, is to place the cart before the horse. In those 21 states DUI is serious by legislative definition of the crime; in Nevada and other states DUI is a petty offense, also by legislative definition of the crime.

At this point the question before the Court narrows to that of a states' rights issue. Petitioners would impose the will of what they perceive to be the majority view upon a minority of states. Most significantly, Petitioners do this under the aegis of a Constitutional mandate. Such a mandate does not exist; nor should this Court create one through the decision it renders in this case by carving out an exception based on Petitioners' viewpoint of DUI as a serious offense across the Nation. As stated in *Landry, supra*, at 1218:

> We are not persuaded that the majority state practice in this respect sets the constitutionally

> required minimum for all states . . . We observe that more recently the Court has refused to condemn a practice as unconstitutional notwithstanding that it had been rejected by forty-eight states and was followed only by two. *Martin v. Ohio*, ___ U.S. ___, 107 S.Ct. 1098, 1103 (1987).

The rulings in *Baldwin, Frank* and *Codispoti* nonetheless instruct that an offense is deemed "petty" or "serious" based on how any given legislature chooses to define the limits of the maximum authorized penalty. Therefore, it is a choice reposing with each state legislature to determine which crimes are classified in such a way that a jury trial right is allowed. As noted in *Argersinger v. Hamlin*, 407 U.S. 25, 39 (1972):

> We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. How crimes should be classified is largely a state matter.

The Constitution serves to provide a framework beyond which the state legislatures cannot go. In other words, states are free to establish whatever punishment for DUI their legislatures may see fit. If a state elects to provide greater than a maximum six month jail term, then the Constitution steps in, under the rulings of this Court, to mandate that the state provide a jury trial right. Where the state chooses to cap the jail term at six months, however, the Constitution will not speak as to whether there will be a bench trial or trial by jury.

The above analysis precisely follows traditional thought with regard to the relationship between the federal government and the States of the Union. The Constitution is there to guide and limit the states, but not, where choice is left to them, dictate that choice, much as

the parent, possessed of the wisdom of experience, guides his offspring into adulthood but does not dictate which path they must choose to follow.

Petitioners place great reliance on two federal cases within the Ninth Circuit to support their position: *United States v. Craner, supra;* and *Bronson v. Swinney, supra.* Yet, the Nevada Supreme Court was mindful of these cases and distinguished them as an " . . . unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin." *Blanton, supra,* at 748 P.2d 500 (also in Appendix "A" to the Petition, page 31). *Landry, supra,* also distinguished the *Craner* case and found no convincing body of lower federal court decisions which have developed a clear consensus contrary to the plain meaning of the Supreme Court cases. *Landry, supra,* at 1214-1215.

B. Fine amount is an insignificant factor for the jury trial issue.

Petitioners rely upon *Rife v. Godbehere,* 814 F.2d 563 (9th Cir. 1987), a prosecution for misdemeanor DUI from the Arizona state court system which held that such an offense became a serious offense allowing a jury trial right where the maximum fine had been increased from $500 to $1000, even though the maximum term of incarceration remained at six months. In *Muniz v. Hoffman,* 422 U.S. 454 (1975), this Court rejected the notion that the amount of a possible fine plays any significant factor in determining whether a jury trial right exists. The *Muniz* case concerned a fine of $10,000 imposed upon a labor union in a contempt proceeding and recognized that fines

are intrinsically different from a possible term of incarceration. While the Court did not set any outer limit on a fine for jury trial purposes, it did indicate that fines are, to some extent, at the bottom of considerations to be entertained.

> It is one thing to hold that deprivation of an individual's liberty beyond a six-month term should not be imposed without the protections of a jury trial, but it is quite another to suggest that, regardless of the circumstances, a jury is required where any fine greater than $500 is contemplated. From the standpoint of determining the seriousness of the risk and the extent of the possible deprivation faced by a contemnor, imprisonment and fines are intrinsically different. *Id.,* at 477.

The Ninth Circuit decision in *Rife* must be considered another anomaly from that Court in view of this Court's holding in *Muniz.* Compare 18 U.S.C. § 1 (repealed effective October 31, 1987) and 18 U.S.C. § 19, which define petty offense under federal prosecutions.

Considering the above analysis, it is difficult to agree with the reasoning of Petitioners. The Respondent City submits that the opinions in *Bronson, Craner,* and *Rife* represent an incomplete statement of the case law in this area and the rationale and policies set forth by this Court.

CONCLUSION

For the above and foregoing reasons, Respondent respectfully requests this Court to affirm the opinion of

the Supreme Court of Nevada. The nature of a misdemeanor DUI offense in Nevada has not changed from what is categorized as "petty" to that of "serious". The maximum authorized punishment remains at six months in jail and/or a $1,000 fine. The "bright-line" test constitutes a clear line of demarcation between petty and serious offenses and can be readily applied in courts throughout the Nation.

Respectfully submitted,

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No. 87-1437

In The

Supreme Court of the United States

October Term, 1987

MELVIN R. BLANTON and
MARK D. FRALEY,

Petitioners,

vs.

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

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QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving a vehicle while intoxicated under Nevada state law is a "serious" crime to which the right to jury trial applies.

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Amendment VI 6

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ARGUMENT

I.

Post-Baldwin Tests Used to Determine and Analyze the Right to Trial by Jury

In *Muniz v. Hoffman*, 422 U.S. 454 (1975), this Court, in determining whether a right to trial by jury existed for criminal contempt pursuant to §10(1) of the Labor Management Relations Act, as amended, "capsulated" constitutional doctrine at 422 U.S. 475-76:

> (1) Like other minor crimes, "petty" contempts may be tried without a jury, but contemnors in serious contempt cases in the federal system have a Sixth Amendment right to a jury trial;
>
> (2) criminal contempt, in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary;
>
> (3) lacking legislative authorization of more serious punishment, a sentence of as much as six months in prison, plus normal periods of probation, may be imposed without a jury trial;
>
> (4) but imprisonment for longer than six months is constitutionally impermissible unless the contemnor has been given the opportunity for a jury trial.

Paragraph 2 is a restatement of the "nature of the offense" test, while paragraph 3 leaves the door open to consider punishment or penalties *other than* potential incarceration and fine. *Muniz* was decided the year after *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974) which stated at 418 U.S. 512:

> Since that time, our decisions have established a fixed dividing line between petty and serious offenses: those crimes carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes.

This author concludes that this Court utilized the *Baldwin, infra,* test in the *Codispoti* case because only a fine and incarceration were at issue. Further, *Baldwin v. New York,* 399 U.S. 66 (1970) was relied upon as authority, which case preserved the "nature of the offense" test. *Baldwin,* 399 U.S. at 69, n.6. The "nature of the offense" test, therefore, remains viable, and the consideration of penalties other than incarceration and fine has been legitimated.

In *Welsh v. Wisconsin,* 466 U.S. 740 (1984), a warrantless home DWI arrest case, Justice White joined by Justice Rehnquist, in dissent, set out certain factors which indicated the "seriousness" of the DWI offense under consideration there. 466 U.S. at 763. Going beyond mere incarceration and fine, one factor was found to be the right to trial by jury set by the legislature, and another factor was the consequence of mandatory driver's license revocation upon conviction of DWI. Cases relied upon as authority were *United States v. Craner,* 652 F.2d 23, 24-27 (CA9 1981); *United States v. Woods,* 450 F.Supp. 1335, 1340 (Md. 1978); *Brady v. Blair,* 427 F.Supp. 5, 9 (SD Ohio 1976), all DWI jury trial cases. The "nature of the offense" case of *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930) was also cited.

These lower federal court decisions, *supra,* as well as analysis set out in *United States v. Jenkins,* 780 F.2d 472 (CA4 1986) and *Landry v. Hoepfner,* 840 F.2d 1201 (CA5 1988), never rely solely on a six-month incarceration "bright-line" standard. Invariably, the "nature of the offense" test, penalties beyond incarceration and fine, and the right to trial by jury in other State jurisdictions are placed into the mix, and balanced against the six-

month standard. The lower federal courts seem reticent to adopt a rigid, fixed test, as Respondent and its *amici* would have this Court do. Even *Landry v. Hoepfner, supra,* a decision which denied the right to trial by jury in a Louisiana state case, parsed each and every non-"bright-line" test, and argued it away.

Amicus State of Nevada complains that Petitioners' authority, *United States v. Craner, supra,* did not legitimate a "collateral consequences" test because the DWI offense there at issue arises from a federal regulation, not Congress as the Nation's surrogate. Petitioners urge this case to the Court's attention because it weighs maximum penalty and other factors about equally in determining the seriousness of the offense.

This Court is urged by Petitioners to retain the reliable, clear-cut *Baldwin* test, but to allow the lower State and Federal courts, at need, as in the case at bar, to evaluate the right to trial by jury by other criteria, *supra.* There are certain offenses, like the Nevada DWI law, which cannot be properly catalogued under the "bright-line" umbrella solely; such offenses cannot be isolated from other real, societal factors and forces that unquestionably gauge them "serious." These hybrid crimes seeking "serious" status, sharing elements of the petty and the serious, should be far and few between. To even imagine a petty crime that would burst onto the American landscape as this DWI offense has done, is difficult, and even that offense has taken 10 years to ripen.

II.

This Court Has Determined That DWI is a Serious Offense

In cases decided by this Court after *Baldwin v. New York,* 399 U.S. 66 (1970), the offense of DWI and its

societal consequences has been painted in somber tones. In *South Dakota v. Neville*, 459 U.S. 553, 558-59 (1983), a DWI case allowing the use of a Defendant's refusal to submit to a blood-alcohol test before the trier of fact as evidence of guilt, the majority prefaced its decision with these words:

> The situation underlying this case – that of the drunk driver – occurs with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439, 77 S.Ct. 408, 412, 1 L.Ed.2d 448 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401, 91 S.Ct. 668, 672, 28 L.Ed.2d 130 (1971) (BLACKMUN, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657, 672, 91 S.Ct. 1704, 1715, 1722, 29 L.Ed.2d 233 (1971) (BLACKMUN, J., concurring) (footnote omitted) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-19, 99 S.Ct. 2612, 2620-2621, 61 L.Ed.2d 321 (1979) (recognizing the "compelling interest in highway safety").

These vivid passages illuminate " . . . an offense of a grave nature, affecting the public at large; . . . ". *Callan v. Wilson*, 127 U.S. 540, 556 (1888). This section of the *Neville* case, itself amply answers *amicus* State of Nevada's assertion (Br. 21) that " . . . Driving under the influence of liquor is not an inherently evil and injurious act as the act itself does not necessarily injure another person and is not universally considered as immoral . . . "

This Court has also expressed the belief that the prevention of drunken driving was properly a *major* concern to the States. *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984); *Welsh, supra*, 466 U.S. at 755 (Blackmun, J., concurring), " . . . the child (drunk driver) is engaging in an act that is dangerous to others who are law abiding and helpless in the face of the child's (drunk driver's) act." (Parentheses and content added); see also, *Welsh, supra*, 466 U.S. at 762-63 (White, J., dissenting).

Amicus State of New Jersey (Br. 21-22) concludes, without authority, that the alternate method of prosecuting drunk driving cases which focuses on 0.10% or more by weight of alcohol in the driver's blood, and de-emphasizes evidence of driving difficulty, field sobriety tests, and physical signs of intoxication, indicates that drunk driving is not a *malum in se* offense. On the contrary, this alternate, easily provable method of conviction attests the firm intent of every State to convict drunk drivers and deter others. See *Welsh, supra*, 466 U.S. at 763 (White, J., dissenting). It does not follow that an offense ceases to be "serious" or one *malum in se* just because a State makes the imminently logical choice to crack down on offenders by a surer, more efficient method of proof.

The cases of this Court, as few as they are, on DWI-related issues, clearly reflect the Nation's perception that the nature of the offense of DWI is "serious", a *malum in se* crime that is "immoral in its nature and injurious in its consequences." Compare, *Morrisette v. United States*, 342 U.S. 246 (1952). Indeed, Respondent and its *amici* cite no case from this Court which states that DWI, as presently constructed in most State jurisdictions and by the federal government, is not a crime *malum in se*; Petitioners have,

however, cited several cases where DWI has been held to be an offense *malum in se* (Br. 22), as well as indicative comments set out in the *Neville* and *Welsh* cases, above.

III.

The Impact of Nationwide DWI Jury Trials

First, only a handful of States do not allow the right to trial by jury in DWI prosecutions. See Appendices of Petitioners, *amici* United States and State of New Jersey. Any decision made by this Court in favor of DWI jury trials will have little national impact. The only State directly affected will be Nevada, although five or six States will have to re-evaluate their existing DWI laws.

Second, neither Respondent nor its *amici* have responded to statistics provided by Petitioners which indicate a waiver rate of upwards of 90% in misdemeanor trials. See Appendices "C" and "D", Opening Brief. In fact, in the State of Nevada itself, Washoe County (Reno Justice Court), as pointed out by *amici* A.C.L.U. (Br. 59-60), jury trials in DWI offenses were set in motion in 1986. In that year 707 individuals were charged but only one jury trial was held at an expense of $284.70. In 1987, 897 individuals were charged, and only 12 jury trials conducted at a total cost of $4,961.36. The waiver rate in 1987 was, therefore, over 98%. Similar high waiver rates were recorded in *Baldwin v. New York*, 399 U.S. 66, 74 n.22 (1970).

Third, *amicus* State of New Jersey paints a gloomy picture of "massive delays" in its judicial system if jury trials were required, thereby impinging on the right to speedy trial. (Br. 26) Amendment VI, United States Constitution. Not only is this supposition unsupported in fact

in New Jersey's brief, but it fails to account for uninterrupted functioning of larger, more complex judicial systems found in the States of New York, California, Illinois, and elsewhere, where DWI jury trials have been allowed for decades.

Further, fiscal impact, also a complaint of Respondent and its *amici*, is a factor that must be weighed along with other factors, it is not of controlling weight. *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

In the area of trial by jury, a more pervasive dedication is found in the cases of this Court. As stated in *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968):

> Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States.

It may further be noted that fiscal considerations have never been injected into the calculus of the right to trial by jury in the previous cases of this Court.

Amicus State of New Jersey (Br. 18), citing *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), argues that a court's consideration of mandatory sentencing minima as found

in Nevada's DWI statute " . . . would illogically compel a jury trial with respect to the offense solely because, in a given case, the prosecutor alleges the existence of . . . aggravating factors and thus seeks the minimum statutory penalty . . . " *McMillan* is mischaracterized in this context. That case forbade a jury trial at a sentencing hearing where the State proved a fact, to wit, that the defendant "visibly possessed a firearm." Upon that finding, by a preponderance of the evidence, a mandatory term was imposed. Here, no fact is proved at sentencing, the mandatory minimum sentence is automatic. Further, Nevada DWI law does not require any aggravating circumstances to be pled, except for subsequent offenses after first conviction. More importantly, mandatory punishments are simply a factor for this Court to consider in determining whether the offense of DWI is serious.

The dire consequences prophesied by the States of Nevada, New Jersey, and Louisiana are, in a constitutional sense, a tempest in a teapot, and unsupported by hard data. Petitioners, on the other hand, as the petitioner in *Baldwin, supra*, have set out the expected high waiver rate of DWI jury trials, minimal costs in Nevada, and a constitutional imperative and commitment to trial by jury where fiscal impact, although a factor, does not carry controlling weight. The verbal hand-wringing of the States in their *amici* briefs brought on by fears of costs and court congestion are more imagined than real. The plain truth is that in Nevada presently, DWI trials are assembly line swift, cheap, and conviction rates are high (82%). It is not hard to imagine why Nevada would hate to give this up.

IV.

The "Bright-Line" Test

Amici for Respondent and the Respondent itself urge this Court in the strongest terms to stubbornly follow a "bright-line" test enunciated in *Baldwin, supra*, and to abandon other tests used to determine the right to trial by jury. This reasoning fails to take into account that " . . . the boundaries of the petty offense category have always been ill-defined, if not ambulatory." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). Basically this Court is being urged to paint itself into a corner by using one test to evaluate every offense.

The *Baldwin* "bright-line" test works fine when incarceration and fine are the only penalties, and the nature of the offense does not indicate a serious offense. But when other significant penalties appear, and the nature of the offense indicates seriousness, a meaningful argument can be made for the right to trial by jury. A review of States' practices in regard to the grant of jury trial should also be made as the third part of the litmus test.

For the Court to rule otherwise, and rest upon the "bright-line" standard of *Baldwin*, will send a message to the States that the "packing" of punishment "under the line" is condoned as long as the six-month barrier is not punctured. The "bright-line" standard is convenient and sure, but in certain offenses, as in the DWI case at bar, the "deep commitment" of this Nation to the right of trial by jury cannot be sacrificed to a sterile "bright-line" requirement. It must be remembered that the "bright-line" standard is just one of this Court's standards, not *the* standard. To adopt one test to the exclusion of the others would be myopic.

Amicus State of New Jersey contends that federal-state disputes will arise if this Court adopts a test or tests other that a "bright-line" standard. Again, this "flood-gate" argument does not withstand analysis. Other than DWI, counsel for Petitioners know of no State petty offense which presses for "serious" status. Even this DWI offense has taken almost a decade to mature to its present posture as a serious crime. But the last answer is that the lower courts can respond to requests for jury trial made in criminal offenses which develop into serious offenses over the course of years.

Amicus State of New Jersey, indeed, concedes that "(o)ther tests and factors proposed by petitioners and *amici curiae* national and Nevada chapters of the American Civil Liberties Union . . . for distinguishing 'petty' from 'serious' offenses are presumably capable of "bright-line" formulation, but are laden with negative consequences . . . " *Amicus* then argues that the decision to allow trial by jury should be left to the legislatures.

V.

Classification of the Offense by the States and Federal Government

Amicus State of New Jersey (Br. 24-25) argues that 22 States punish DWI with potential incarceration beyond the six-month *Baldwin* standard, 4 States have determined that DWI is a "serious" offense independent of relevant penalties, 6 States do not allow DWI jury trials, and 19 States do not recognize *Baldwin's* petty/serious dichotomy for any offense. The point is asserted that these latter 19 jurisdictions are, as support for a national consensus, useless as to those jurisdictions' views as to the

seriousness of drunk driving. This argument, at first blush, possesses appeal, but upon closer analysis the argument fails. Because a State chooses to allow a defendant the right to trial by jury in DWI *and* other non-serious offenses, means no more than that State has determined that *all* criminal offenses are serious, and worthy of the right to trial by jury. The reasoned voices of 19 States cannot be just dismissed. It is less a question of whether these 19 States consider DWI to be a serious offense, and more a question of 45 States absolutely allowing jury trials for DWI defendants. In the vast majority of States, a defendant has a jury trial option (even in Reno, Nevada), but in 6 States the unlucky defendant has no option.

The federal government in 18 U.S.C. §1 punishes petty offenses with as much as 6 months imprisonment and a $5,000 fine. This Court, however, has specifically determined that that definition cannot be accorded talismanic significance. *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975).

Respondent and its *amici* argue that this Court in *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098 (1987), *reh'g denied* 107 S.Ct. 1913 (1987), in not ruling on the basis of sheer numbers of States which have adopted a rule, should thereby adopt a similar posture in this case. First, Petitioners do not urge the numbers of States which allow the right to jury trial as a sole determining test, but as one test in the ultimate determination that DWI is a serious offense. Second, the sense of this Court's cases indicates national uniformity as a defined goal. *Baldwin v. New York*, 399 U.S. 66, 70-71 (1970). National uniformity is

turned upside-down if 6 States can mandate the federal constitutional rule for the 45.

This Court has further found that although classification is a matter for the States, that

> In the absence of an explicit constitutional provision, the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance.

The State of Nevada, by way of the penalties available for DWI, has implicitly assigned that offense to the serious category. Respondent and its *amici* in their briefs, have been strangely silent about whether those punishments call for a right to trial by jury. This Court can review Appendix "B" of Petitioners' Opening Brief for criminal sanctions and civil (administrative) actions associated with a DWI conviction for the States as a whole. Nevada's DWI law, of course, contains added punishments not listed in this table.

CONCLUSION

Wherefore, for the foregoing reasons, Petitioners pray that the judgment below be reversed.

Respectfully submitted:

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No. 87-1437

In the Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON AND MARK D. FRALEY, PETITIONERS

v.

CITY OF NORTH LAS VEGAS, NEVADA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the Sixth Amendment, as applied to the States through the Fourteenth Amendment, requires a jury trial for the offense of driving under the influence of alcohol, where the maximum penalty is a term of six months' imprisonment.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the Constitution requires a jury trial for the offense of driving under the influence of alcohol (DUI), where the maximum penalty for the offense is a term of six months' imprisonment. Under the Assimilative Crimes Act, 18 U.S.C. 13, the United States prosecutes DUI and other offenses in violation of state law when those offenses are committed on federal enclaves. The United States takes the position in such cases that a jury trial is not required where, under applicable state law, the offense is punishable by a maximum term of six months' imprisonment or less and thus would be a "petty offense" as that term is used in the United States Code. See 18 U.S.C. 19; 18 U.S.C. (Supp. IV) 3581(b)(7), (8) and (9); Fed. R. Crim. P. 54(c); see also Rule 2(b)(6) of the Rules of Procedure for the Trial of Misdemeanors before United States Magistrates. In addi-

tion, the United States prosecutes a variety of petty offenses committed on property subject to the jurisdiction of the National Park Service. See, *e.g.*, 36 C.F.R. Pts. 1, 2, 3, 4, 5, 7, 12 and 13. Those offenses, which include DUI (see 36 C.F.R. 4.23(a)) and other traffic violations, carry penalties of no more than six months' imprisonment. See 36 C.F.R. 1.3.

The federal courts handle a huge number of petty offense cases each year. During the period June 30, 1986, to June 30, 1987, for example, United States magistrates disposed of 83,092 petty offenses, 56,763 of which were traffic offenses. Administrative Office of the United States Courts, *Annual Report of the Director*, Tables M-1A, M-2, at 393, 397 (1987). To extend the right to a trial by jury in even a small percentage of those cases would have a marked impact on the administration of justice in the federal system. Accordingly, the United States has a direct and substantial interest in the Court's resolution of the question presented in this case.

STATEMENT

1. In Nevada, driving under the influence of alcohol (DUI) is a misdemeanor punishable by a mandatory minimum term of two days' imprisonment and a maximum term of six months' imprisonment. Nev. Rev. Stat. Ann. § 484.3792.1(a)(2) (Michie Supp. 1988). The first offender must pay a mandatory minimum fine of $200 and may be fined a maximum of $1,000; the first offender must also attend, at his own expense, an alcohol abuse educational course (*id.* § 484.3792.1(a)(3) and (1)). Upon conviction, the first offender automatically loses his license for 90 days (*id.* § 483.460.1(c)). A state prosecutor may not dismiss a DUI charge in exchange for a guilty plea to a lesser charge or for any other reason, "unless he knows or it is obvious" that there is insufficient evidence

to prove the offense (*id.* § 484.3792.3). Courts may not suspend sentences or impose probation for DUI convictions (*ibid.*).[1]

On June 29, 1986, in North Las Vegas, Nevada, a police officer arrested petitioner Mark D. Fraley and charged him with a DUI offense in violation of Nev. Rev. Stat. Ann. § 484.379 (Michie 1986). After the North Las Vegas Municipal Court denied Fraley's demand for a jury trial, Fraley pleaded guilty. The court sentenced Fraley to five days' imprisonment and a $300 fine; the court also ordered Fraley to attend an alcohol abuse educational course. J.A. 1. On appeal, the Eighth Judicial District Court concluded that Nev. Rev. Stat. Ann. § 266.550 (Michie 1986) unconstitutionally deprived the North Las Vegas Municipal Court of the power to conduct a trial by jury (J.A. 27). The reviewing court therefore reversed Fraley's conviction and remanded the case to the North Las Vegas Municipal Court for a jury trial (J.A. 25-27).

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[1] If the court does not impose a mandatory prison term, the court must order the first offender "to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having [committed a DUI offense]." Nev. Rev. Stat. Ann. § 484.3792.1(a)(2) (Michie Supp. 1988).

A second DUI offense, also a misdemeanor, is punishable by a mandatory minimum term of ten days' imprisonment and a maximum term of six months' imprisonment. The second offender must also pay a mandatory minimum fine of $500 and may be fined a maximum of $1,000. Nev. Rev. Stat. Ann. § 484.3792.1(b) (Michie Supp. 1988). The second offender may also lose his license for one year (*id.* § 483.460.1(b)(5)). A third DUI offense is punishable by a mandatory minimum term of one year in prison and a maximum term of six years' imprisonment; the third offender must pay a mandatory minimum fine of $2,000, and may be fined a maximum of $5,000 (*id.* § 484.3792.1(c)). The third offender also loses his license for three years (*id.* § 483.460.1(a)(2)).

On July 18, 1986, also in North Las Vegas, a police officer arrested petitioner Melvin R. Blanton and charged him with a DUI offense. The North Las Vegas Municipal Court denied Blanton's demand for a jury trial. J.A. 18, 56. Blanton petitioned the Eighth Judicial District Court for a writ of mandamus. The court denied the petition. J.A. 20-21.

2. Blanton appealed to the Nevada Supreme Court from the order denying his petition for mandamus. In Fraley's case, respondent City of North Las Vegas filed an original petition for a writ of certiorari with that court. J.A. 21-23, 28-52. The court consolidated the cases along with several others that raised similar issues (J.A. 4-5).

The Nevada Supreme Court held that the Sixth Amendment, as applied to the States through the Fourteenth Amendment, does not require a jury trial for a DUI offense where the maximum penalty is a term of six months' imprisonment (Pet. App. 1-46).[2] Accordingly, the court remanded Fraley's case with instructions to reinstate the conviction and remanded Blanton's case with instructions to proceed without a jury trial (*id.* at 45-46).

The Nevada court noted that in *District of Columbia* v. *Colts*, 282 U.S. 63 (1930), this Court had looked to the nature of the offense as a guidepost for determining whether a particular offense required a jury trial. Nonetheless, the Nevada court read this Court's more recent decisions such as *Baldwin* v. *New York*, 399 U.S. 66

[2] The court found no state constitutional requirement for a jury trial, because "the right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution" (Pet. App. 16). The court also disposed of the state law issue raised in Fraley's case by concluding that the North Las Vegas Municipal Court has the authority, despite Nev. Rev. Stat. Ann. § 266.550 (Michie 1986), to conduct jury trials in DUI cases (Pet. App. 12-15).

(1970), and *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), as "retreat[ing] from [that] position * * * [toward] a more workable objective test based on the severity of the maximum possible penalty alone" (Pet. App. 22).

While acknowledging that its decision was in conflict with several federal court decisions,[3] the Nevada Supreme Court concluded that those decisions represented "an unnecessary and unwarranted expansion of the Supreme Court's holding in *Baldwin*," because "the collateral consequences of a conviction have not been a criterion relied upon in [its] recent decisions" (Pet. App. 31).[4] As the court explained (*id.* at 31-32):

> [T]he [Supreme] Court's references to "line drawing" in *Duncan* and *Baldwin*, and its increasing reliance upon the maximum punishment as the sole criterion for characterizing offenses as "serious" or "petty," suggest that only the maximum punishment for an offense need be examined to determine whether a jury trial is constitutionally mandated.

SUMMARY OF ARGUMENT

The Constitution provides a right to a jury trial for "all Crimes" (Art. III, § 2) and in "all criminal prosecutions" (Amend. VI). Those provisions, however, do not require

[3] In *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981), and *Bronson* v. *Swinney*, 648 F. Supp. 1094 (D. Nev. 1986), the courts held that the nature of a DUI offense, together with the collateral consequences from a conviction, render that offense "serious" for purposes of the constitutional right to jury trial. In *Bronson*, the district court specifically held that the Nevada DUI offense must be tried to a jury (648 F. Supp. at 1098-1101).

[4] The court also identified certain "policy considerations" to support its ruling, such as the added expense of conducting jury trials in misdemeanor DUI cases and the fact that some municipal courts are staffed by nonlawyer judges (Pet. App. 33-42).

jury trials in all criminal cases. In accordance with the common law practice, this Court has long recognized that the constitutional right to a jury trial does not apply to petty offenses. Although the Court in several early decisions looked to the nature of a crime and its common law roots in determining whether the crime was sufficiently serious to require a trial by jury, the Court in more recent cases has focused on the maximum penalty provided for the offense as the principal criterion in determining whether the right to a jury trial attaches. That criterion remains the most reliable means of determining whether society regards a particular offense as sufficiently serious to trigger the right to a trial by jury.

The historical practice, which is reflected in the federal definition of a petty offense, 18 U.S.C. 19, 3581(b)(7)-(9), has been to provide jury trials only for those offenses that are punishable by more than six months' imprisonment. The Court has recognized the six-month maximum penalty as the appropriate constitutional dividing line between serious and petty offenses, and we submit that it is the proper constitutional test for determining when the right to a jury trial attaches. Only those offenses carrying maximum sentences in excess of six months' imprisonment must be tried to juries.

In Nevada, as in many States, a first DUI offense is punishable by a maximum of six months' imprisonment. In this case, the Nevada Supreme Court properly focused on the maximum punishment for a first DUI offense in concluding that the Constitution did not require that petitioners be accorded a jury trial. We agree that neither the inherent "nature" of an offense nor the collateral consequences of a conviction provide an accurate indicator of the seriousness of the offense for purposes of the constitutional jury trial guarantee. In addition, contrary to petitioners' assertion (Br. 17-18), current practices among the

States in providing jury trials for DUI offenses do not suggest the nature of DUI is such that the Constitution requires that DUI defendants be accorded a jury trial regardless of the maximum penalty provided for the offense under the applicable state law.

ARGUMENT

PETITIONERS WERE NOT ENTITLED TO A JURY TRIAL ON THE CHARGE THAT THEY WERE DRIVING UNDER THE INFLUENCE OF ALCOHOL

A. An Offense Punishable By A Maximum Term Of Six Months' Imprisonment Is A Petty Offense Triable Without A Jury

1. Article III, Section 2, of the Constitution provides that "[t]he Trial of all Crimes * * * shall be by jury." The Sixth Amendment similarly provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a * * * trial, by an impartial jury * * *." Although the language is unqualified, those provisions have not been construed to require jury trials for all criminal offenses. Rather, the constitutional language has been "interpreted in the light of the principles which, at common law, determined whether the accused, in a given class of cases, was entitled to be tried by a jury." *Callan* v. *Wilson*, 127 U.S. 540, 549 (1888).

The English common law practice permitted a wide range of minor or petty criminal offenses to be resolved summarily before magistrates and justices of the peace without a jury, and that practice was generally followed in the American colonies. See Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917 (1926). As one 19th century American commentator explained:

> It is evident that a jury trial cannot be demanded in every case where a person is punished for a criminal

> offence. Such was not the practice at any time in the common law, and before the adoption of our Constitutions. * * * [T]here has always been a method for punishing offences of a minor grade, by inferior judicial officers * * * without a trial by jury; and * * * our Constitutions giving the right of a trial by jury, either expressly or impliedly, refer to this antecedent practice * * *.
>
> * * * If there be any general rule in common to all it is this: that in England, under the common law and various statutes, and here at the time of the adoption of our Constitutions, the trial of minor offences, such as * * * the punishment of intoxication, * * * and the punishment of the violation of laws and ordinances of local municipal bodies, was without a jury, before magistrates generally denominated justices of the peace.

J. Proffatt, *A Treatise on Trial by Jury* § 95, at 135-136 (1877 & photo. reprint 1986) (footnote omitted).

The initial draft of the jury trial guarantee in Article III used the term "criminal offenses." In place of that term, the Committee of Style substituted the term "crimes," which was understood at the time to denote "such offenses as are of a deeper and more atrocious dye." 4 W. Blackstone, *Commentaries on the Laws of England* 5 (1st American ed. 1772).[5] As the Court noted in *Schick* v.

[5] Available records of the Constitutional Convention of 1787 shed little light on the decision by the Committee of Style to substitute the term "criminal offences" for the word "crimes" in the final version of Article III. See 1 J. Elliot, *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution* 149, 229, 270, 304 (2d ed. 1854) (Elliot's Debates); 2 M. Farrand, *The Records of the Federal Convention of 1787*, at 144, 173, 187, 433, 438, 576 (rev. ed. 1966); 2 J. Madison, *The Debates in the Federal Convention of 1787*,

United States, 195 U.S. 65, 69-70 (1904), the use of the term "crimes" appears to confirm the Framers' intent to retain the practice of summary criminal prosecutions for petty offenses.[6]

2. The Constitution thus creates "the essential if not wholly satisfactory [task] * * * of determining the line between 'petty' and 'serious' [offenses] for purposes of the Sixth Amendment right to jury trial." *Baldwin* v. *New York*, 399 U.S. 66, 68 (1970) (plurality opinion). The Court's early decisions sought to resolve the question of the applicability of the jury trial right by focusing on the seriousness of the offense in question and whether that of-

at 344, 477 (G. Hunt & J. Scott eds. photo. reprint 1987). Addressing the Virginia Ratifying Convention in 1788, however, James Madison did state (3 Elliot's Debates 537 (emphasis in original)) that

> [t]he *trial by jury* is held as sacred in England as in America. There are deviations from it in England; yet greater deviations have happened here, since we established our independence, than have taken place there for a long time * * *. It is a misfortune in any case that this trial should be departed from; yet in some cases it is necessary.

[6] The Court has consistently read the jury trial provisions of Article III and the Sixth Amendment as equivalent. *E.g.*, *Callan* v. *Wilson*, 127 U.S. at 549-550. The Sixth Amendment right to jury trial for serious criminal offenses applies to the States through the Fourteenth Amendment. *Duncan* v. *Louisiana*, 391 U.S. 145, 157-158 (1968).

The Court has addressed the apparent inconsistency between its treatment of the constitutional jury trial guarantee and other constitutional protections applicable to criminal prosecutions. In *Argersinger* v. *Hamlin*, 407 U.S. 25, 30, 31 (1972) (footnote omitted), the Court, on the basis of the "historical support for limiting the 'deep commitment' to trial by jury to 'serious criminal cases,' " rejected the argument "that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may also be tried without a lawyer." The Court also made clear that other Sixth Amendment protections, such as the right to a public trial and the right to confront witnesses, have historically not been limited to felonies or serious offenses (*id.* at 28).

fense or an analogous one was triable to a jury at common law. The Court's more recent decisions, however, have discarded the case-by-case effort to assess the seriousness of an offense or its treatment at common law, in favor of a simpler and more objective test focusing on the maximum penalty that the offense carries. The latter inquiry, we submit, is the proper means of determining whether the Constitution requires that an offense be tried to a jury.

In *Callan* v. *Wilson, supra,* the defendant, a union musician, was convicted after a bench trial of conspiring to prevent certain nonunion musicians from working. The defendant refused to pay a $25 fine and was sentenced to 30 days' imprisonment. 127 U.S. at 540-542. In determining whether the defendant was entitled to a jury trial, the Court looked only to "the nature of the crime of conspiracy at common law" (*id.* at 556). Finding that conspiracy "is by no means a petty or trivial offence" (*id.* at 555), but instead "is an offence of a grave character" (*id.* at 556), the Court concluded that the offense must be tried to a jury.

In *District of Columbia* v. *Colts,* 282 U.S. 63 (1930), the Court followed a similar line of analysis. The defendant in the *Colts* case was charged with the crime of driving recklessly so as to endanger people, an offense that was punishable by a maximum of 30 days' imprisonment. Focusing "primarily upon the nature of the offense," the Court held that the defendant was entitled to a jury trial for two reasons: first, the offense "in its very nature is *malum in se* * * * [and] was an indictable offense at common law"; and second, driving recklessly so as to endanger people "is an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense" (*id.* at 73 (emphasis in original)).

Since the decisions in *Callan* and *Colts,* the Court has moved away from the approach used in those cases. In

light of the difficulty of finding common law analogues for many modern day offenses, the Court has abandoned the effort to determine whether a particular offense would have been indictable at common law. In addition, rather than attempting to determine in the abstract whether a particular offense was of sufficient "depravity" to be deemed serious, the Court has looked to the penalty imposed for the offense. Under that approach, the Court has looked to the size of the penalty as the best measure of the seriousness of the offense as the legislature viewed it, and thus as the determining factor in deciding whether the offense carries with it a right to trial by jury.

The penalty-oriented approach had its origins as early as 1904 in *Schick* v. *United States, supra.* There, the defendant was convicted summarily of selling unstamped oleomargarine in violation of a federal revenue statute and was ordered to pay a $50 fine. The Court concluded that the crime charged was a petty offense because "[s]o small a penalty * * * indicates * * * [i]t is not one necessarily involving any moral delinquency" (195 U.S. at 67). As the Court explained, the nature of the offense, and in particular "the amount of the punishment prescribed" determine "whether it is to be classed among serious or petty offenses" (*id.* at 68).

Subsequently, in *District of Columbia* v. *Clawans,* 300 U.S. 617, 625 (1937), the Court again refused to rely exclusively on the common law treatment of the offense, but instead considered the severity of the penalty in determining whether a statutory offense "must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial." Such an inquiry, the Court noted, involves an "objective standard[]" that may be "taken as a gauge of [the community's] social and ethical judgments" (*id.* at 628).

The defendant in *Clawans* was convicted of unlawfully selling unused portions of railway tickets, an offense punishable by a maximum sentence of 90 days' imprisonment (300 U.S. at 623). Reviewing practices among the Colonies and the States in the late 18th century, the Court found numerous examples of summary disposition of petty offenses with punishments exceeding three months' imprisonment (*id.* at 625-630). The Court then concluded that a penalty of that size, "when attached to the offense of selling second-hand goods without a license," did not give the crime "the character of * * * a major offense" (*id.* at 630).

By stating that the severity of the penalty was a principal factor in the constitutional inquiry, the *Clawans* Court foreshadowed the approach the Court has embraced during the past 20 years. In keeping with the trend toward an objective standard, the Court in *Clawans* observed that the question of a defendant's right to jury trial "must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments" (300 U.S. at 628).[7]

More recent decisions, following the approach used in *Clawans,* have focused on the maximum penalty for an offense as the proper criterion for determining whether the right to a jury trial attaches. A series of three cases decided

[7] In a statement further anticipating the six-month penalty that the Court ultimately settled on as the appropriate dividing line between serious and petty offenses, the Court observed in *Clawans* (300 U.S. at 627-628 (footnote omitted)) that

> we may doubt whether summary trial with punishment of more than six months' imprisonment, prescribed by some pre-Revolutionary statutes, is admissible without concluding that a penalty of ninety days is too much.

in 1968 and 1969 have become the leading authorities for that point.

In *Duncan* v. *Louisiana,* 391 U.S. 145, 159 (1968), the Court made clear that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not." The Court noted that petty offenses were tried without juries in England and the Colonies "and have always been held to be exempt from the otherwise comprehensive language of the Sixth Amendment's jury trial provisions" (*id.* at 160). There is no evidence that the Framers intended to depart from that practice, the Court observed.

In determining whether a particular offense was "petty" or "serious" for jury trial purposes, the *Duncan* Court emphasized that it was important to use "objective criteria" (391 U.S. at 161) to make the constitutional determination. Furthermore, the court noted that "[t]he penalty authorized by the law of the locality may be taken 'as a gauge of its social and ethical judgments' * * * of the crime in question" (*id.* at 160 (citation omitted)). While not deciding precisely where the line should be drawn between petty offenses and serious crimes, the Court concluded that a crime carrying a potential penalty of two years' imprisonment is a serious crime and not a petty offense.

Frank v. *United States,* 395 U.S. 147 (1969), which was decided the year after *Duncan,* made the same point. As in *Duncan,* the Court in *Frank* explained that in determining whether the jury trial right attached in a prosecution for a particular crime, the Court sought "objective indications of the seriousness with which society regards [an] offense" and that "[t]he most relevant indication of the seriousness of an offense is the severity of the penalty authorized for its commission" (*id.* at 148). Although *Frank* was a contempt case in which there was no statutory

maximum penalty, the Court noted that in "ordinary criminal prosecutions, the severity of the penalty authorized * * * is the relevant criterion" for distinguishing between petty and serious offenses (*id.* at 149). In such cases, the Court explained, "the legislature has included within the definition of the crime itself a judgment about the seriousness of the offense" (*ibid.*).

Finally, in *Baldwin* v. *New York*, 399 U.S. 66 (1970), which was decided the following year, a plurality of the Court announced a standard that it distilled from prior precedents.[8] The Court stated that it looked to "objective criteria reflecting the seriousness with which society regards the offense * * * [and] found the most relevant such criteria in the severity of the maximum authorized penalty."[9] Indeed, the Court referred to the maximum

[8] Three Justices joined the plurality opinion. Justices Black and Douglas concurred in the judgment but did not agree that the Constitution permits petty offenses to be tried without a jury. Chief Justice Burger and Justices Harlan and Stewart dissented on the ground that the incorporation doctrine should not be invoked to apply the jury trial requirements of the Constitution in full force to the States. See 399 U.S. at 76-77 (Burger, C.J., dissenting); *id.* at 117-143 (Harlan, J., dissenting); *id.* at 143-145 (Stewart, J., dissenting). Justice Harlan and apparently Justice Stewart agreed with the plurality, however, that for federal purposes the six-month period of imprisonment was the appropriate dividing line between serious and petty crimes. See 399 U.S. at 120-121 (Harlan, J., dissenting); *id.* at 143 (Stewart, J., dissenting). Accordingly, five Members of the Court agreed on the six-month period of imprisonment as the correct point at which the constitutional right to a jury trial should attach. For that reason, we refer to the plurality's reasoning on that point as setting forth the view of the Court.

[9] Cf. *Welsh* v. *Wisconsin*, 466 U.S. 740, 754 n.14 (1984) ("Given that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense.").

penalty as "the only objective criterion by which a line could ever be drawn * * * between offenses that are and that are not regarded as 'serious' for purposes of trial by jury." *Id.* at 68, 72-73 (footnote omitted).[10]

3. At the same time that it was settling on the maximum penalty as the sole criterion for determining whether a jury trial is required, the Court established a "bright line" test to distinguish petty from serious crimes for purposes of the jury trial guarantee. The Court has concluded that crimes "carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty offenses." *Codispoti* v. *Pennsylvania*, 418 U.S. 506, 512 (1974); see *id.* at 519 (Marshall, J., concurring). That constitutional dividing line,

[10] The Court has followed a roughly similar line of analysis in cases involving contempts of court. In *United States* v. *Barnett*, 376 U.S. 681, 682-683 (1964), which was decided several years before *Duncan*, the Court held that criminal contempt is a petty offense that need not be tried to a jury. In dictum, the Court noted that "our cases have indicated that, irrespective of the severity of the offense, the severity of the penalty imposed * * * might entitle a defendant to the benefit of a jury trial" (*id.* at 695 n.12 (citing *District of Columbia* v. *Clawans*, *supra*)). Justice Clark, writing for the Court, added (*ibid.*) that "[s]ome members of the Court are of the view that, without regard to the seriousness of the offense, punishment by summary trial without a jury would be constitutionally limited to that penalty provided for petty offenses." Two years later, in *Cheff* v. *Schnackenberg*, 384 U.S. 373, 379 (1966), a plurality of the Court followed *Barnett* to hold that an individual who received a six-month sentence for criminal contempt was not entitled to a jury trial. The plurality reasoned that a jury trial was not required because the sentence fell within the range Congress prescribed for petty offenses and the nature of a criminal contempt offense did not call for different treatment (*id.* at 379-380). The Court subsequently held that a jury trial was required in contempt cases in which penalties of more than six months' imprisonment were imposed. See *Bloom* v. *Illinois*, 391 U.S. 194 (1968); *Dyke* v. *Taylor Implement Co.*, 391 U.S. 216, 220 (1968).

although necessarily somewhat arbitrary (see *Baldwin*, 399 U.S. at 73; *Duncan*, 391 U.S. at 160-161) has a sound historical basis and is consistent with contemporary standards. As the Court has noted, "in the late 18th century in America crimes triable without a jury were for the most part punishable by no more than a six-month prison term." *Duncan* v. *Louisiana*, 391 U.S. at 161; see *Baldwin* v. *New York*, 399 U.S. at 71; *District of Columbia* v. *Clawans*, 300 U.S. at 626-627. At the time of *Duncan*, even in the absence of any constitutional compulsion the States were nearly unanimous in the view that offenses punishable by more than six months' imprisonment should be tried to juries. See *Duncan* v. *Louisiana*, 391 U.S. at 161 & n.33; *Baldwin* v. *New York*, 339 U.S. at 71-72. And in the federal system, Congress has consistently defined as petty any offense punishable by no more than six months' imprisonment.[11] It is thus clear from this Court's precedents, as well as historical and contemporary practice, that a defendant has a right to a jury trial for any offense carrying a maximum penalty of more than six months' imprisonment, but he does not have a right to a jury trial for an offense carrying a maximum penalty of six months' imprisonment or less.

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[11] See, *e.g.*, 18 U.S.C. (1982 ed.) 1(3); 18 U.S.C. 19; 18 U.S.C. (Supp. IV) 3581(b)(7), (8) and (9).

In the Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 76-77, Congress vested district courts with exclusive jurisdiction over "all crimes and offences * * * cognizable under the authority of the United States, * * * where no other punishment than whipping * * * a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted." Congress specifically provided (*id.* at 77) that "the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury." Congress enacted no such provision for the trial of "crimes and offences" in which the maximum penalty was six months or less and which were tried in the district courts.

B. A DUI Offense, Punishable By A Maximum Term Of Six Months' Imprisonment, Should Be Treated As A Petty Offense Triable Without A Jury

The application of these principles to this case is straightforward. The Nevada DUI law provides for a maximum of six months' imprisonment for first offenders such as petitioners. Therefore, petitioners are not constitutionally entitled to a jury trial. If there were any doubt of the application of those principles in the context of a DUI offense, the Court just two Terms ago reaffirmed the vitality of the six-month constitutional dividing line for purposes of the right to a jury trial, and it did so in the context of a DUI prosecution. In *Bairnsfather* v. *Louisiana*, No. 86-5656 (Apr. 6, 1987), the appellant challenged the Louisiana courts' refusal to grant him a jury trial for a DUI offense. Although the DUI offense carried a maximum penalty of only six months' imprisonment, the appellant argued that the crime was a serious offense for constitutional purposes, because of the nature of the offense and the collateral consequences that a defendant could suffer upon conviction. See 86-5656 J.S. 8-9. The Court, however, dismissed the appeal in that case for want of a substantial federal question. That precedent is directly applicable here and should be dispositive.[12]

Petitioners contend that the nature of the DUI offense (Br. 18-22), as well as the collateral consequences of a conviction (Br. 9-16), render the Nevada DUI offense sufficiently serious to require a jury trial in spite of the six-

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[12] The Court's dismissal for want of a substantial federal question represents a decision on the merits and therefore has precedential value, albeit less value than an opinion of the Court after full briefing and argument. See, *e.g.*, *Southern Railway Co.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 462 (1979); *Hicks* v. *Miranda*, 422 U.S. 332, 343-345 (1975).

month cap on the authorized penalty. Moreover, petitioners suggest (Br. 17-18) that current state practices regarding jury trials for DUI offenses confirm that DUI offenses should be tried to a jury. The Court's decisions, however, show that neither the inherent nature of an offense nor its collateral consequences are an accurate indicator of its seriousness for purposes of the constitutional jury trial guarantee. And, contrary to petitioners' suggestion, most States treat DUI as a petty offense and do not regard it as an offense that requires a trial by jury as a constitutional matter.

1. As even petitioners concede (Br. 21), the Court has all but explicitly abandoned its inquiry, last announced in *District of Columbia* v. *Colts, supra,* into an offense's common law pedigree. That inquiry would be fruitless in the case of modern statutory offenses that were unknown to the common law, and even if a common law analogue could be found, the treatment of the analogous offense at common law would not necessarily shed light on whether society now considers the offense sufficiently serious to warrant a trial by jury.[13]

Any inquiry into the "nature of an offense," without regard to the maximum penalty attached, would be equally

[13] This case demonstrates the difficulty (and ultimate futility) of looking to the treatment of a given offense at common law. The closest common law analogue to DUI presumably would have been driving a wagon or horsecart while drunk. Available authority suggests that that offense, as opposed to reckless driving so as to endanger others, the offense that was at issue in *Colts,* was not an indictable offense at common law. See, *e.g., State* v. *Rodgers,* 91 N.J.L. 212, 102 A. 433 (1917). Yet the historical analogy obviously does not speak very clearly to the question whether the offense of DUI is sufficiently serious to warrant trial by jury. Instead, as we set out above, it is the legislature's assignment of a penalty that is the most accurate gauge of the seriousness of an offense.

uninformative, as it would inevitably call for subjective evaluations by the courts as to the culpability of particular conduct. To attempt to divine the "nature of the offense" would thus violate this Court's instruction that the constitutional inquiry should be based on objective criteria. *E.g., Baldwin* v. *New York,* 399 U.S. at 68; *Frank* v. *United States,* 395 U.S. at 148; *Duncan* v. *Louisiana,* 391 U.S. at 161; *District of Columbia* v. *Clawans,* 300 U.S. at 628. In addition, it would disregard the "most relevant indication of the seriousness of an offense" (*Frank* v. *United States,* 395 U.S. at 148)—the legislature's assignment of a particular penalty to the crime.

We do not doubt that DUI may be "an act repugnant to the moral sense of the community" (Br. 22); See *Welsh* v. *Wisconsin,* 466 U.S. at 755 (Blackmun, J., concurring). Indeed, the same judgment should hold true for any criminal offense that is punishable by imprisonment, even for a relatively short term. If the repugnancy of the conduct were the test, however, any criminal act more serious than a minor infraction would give rise to a jury trial right. And, in any event, if a court's sense of moral repugnance were the test, there would be no hope of obtaining certainty and predictability in determining what offenses must be tried to a jury. The open-ended and subjective standard advocated by petitioners would ignore the legislature's choice and could convert almost any criminal offense into one requiring a jury trial, a result the Court long ago held the Constitution did not require.

Looking to the collateral consequences from a conviction to determine the offense's seriousness, as petitioners suggest (Br. 9-16), would run a similar risk of permitting subjective determinations to control the right to a jury trial. Conviction for any crime has collateral consequences, yet the Court has never stated that those consequences define the seriousness of an offense. Instead, the

Court in *Duncan* v. *Louisiana*, 391 U.S. at 160, has made clear that

> the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications.

Accord *Baldwin* v. *New York*, 339 U.S. at 73. There is simply no ascertainable standard by which a court could reasonably distinguish the collateral consequences resulting from a DUI conviction from those resulting from other petty offenses to the extent necessary to justify a constitutional difference for purposes of the jury trial guarantee. See *Landry* v. *Hoepfner*, 840 F.2d 1201, 1216 (5th Cir. 1988) (en banc), petition for cert. pending, No. 88-5043. Many traffic violations can result in the suspension or loss of a driver's license or compulsory attendance at safe driving schools. Moreover, the opprobrium attached to driving while intoxicated would be difficult to distinguish, for constitutional purposes, from the opprobrium attached to other petty offenses such as public intoxication or engaging in various forms of disorderly conduct.

2. Most state and federal courts that have addressed the issue have held that an offense such as DUI, when it carries a penalty of no more than six months' imprisonment, does not require a jury trial. For example, the en banc Fifth Circuit recently held that a DUI offense under Louisiana law was a petty offense, triable without a jury, because the maximum potential penalty was six months' imprisonment. *Landry* v. *Hoepfner*, *supra*. The court, thoroughly analyzing this Court's decisions, explicitly rejected arguments that the nature of the DUI offense itself or the collateral consequences resulting from a conviction

elevated the offense to a "serious" crime for purposes of the Sixth and Fourteenth Amendments (840 F.2d at 1210-1217). See also *United States* v. *Jenkins*, 780 F.2d 472, 474 (4th Cir.), cert. denied, 476 U.S. 1161 (1986); *United States* v. *Fletcher*, 505 F. Supp. 1053, 1054 (W.D. Va. 1981); *Matos* v. *Rodriguez*, 440 F. Supp. 673, 676-677 (D.P.R. 1976); *Thomas* v. *State*, 331 A.2d 147 (Del. 1975); *State* v. *Henderson*, 491 So. 2d 647, 650 (La. 1986); *State* v. *Smith*, 99 Nev. 806, 810, 672 P.2d 631, 634 (1983); *State* v. *Morrill*, 123 N.H. 707, 709-713, 465 A.2d 882, 884-886 (1983); *State* v. *Linnehan*, 197 N.J. Super. 41, 43-44, 484 A.2d 34, 35 (App. Div. 1984), cert. denied, 99 N.J. 236, 491 A.2d 723 (1985); *State* v. *Sweat*, 78 N.M. 512, 513-514, 433 P.2d 229, 230-231 (1967); *Commonwealth* v. *Fischl*, 363 Pa. Super. 173, 177-180, 525 A.2d 775, 777-778 (1987); *State* v. *Holliday*, 109 R.I. 93, 280 A.2d 333 (1971).

Four federal courts and three state courts have concluded that the Constitution requires that DUI defendants be accorded a trial by jury even where the offense carries a maximum penalty of six months or less. See *United States* v. *Craner*, 652 F.2d 23 (9th Cir. 1981); *Bronson* v. *Swinney*, 648 F. Supp. 1094 (D. Nev. 1986); *United States* v. *Woods*, 450 F. Supp. 1335 (D. Md. 1978); *Brady* v. *Blair*, 427 F. Supp. 5 (S.D. Ohio 1976); *Rothweiler* v. *Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966); *State* v. *O'Brien*, 68 Haw. 39, 704 P.2d 883 (1985); *City of Casper* v. *Cheatham*, 739 P.2d 1222 (Wyo. 1987). Those courts have generally relied on the collateral consequences of a DUI conviction as the reason for holding the jury trial right applicable. That approach to the constitutional issue, however, is inconsistent with the analysis in this Court's decisions, as we have discussed above.

Nor are those courts' other justifications for requiring jury trials in DUI cases convincing. The district court in *Bronson* v. *Swinney*, *supra*, which required that Nevada

provide a jury trial in DUI cases, based its ruling in part on the fact that the Nevada DUI statute has a mandatory minimum two-day jail sentence. See 648 F. Supp. at 1098-1100. The presence of a minimum sentence, however, does not suffice to convert DUI into a "serious" offense for constitutional purposes. This Court has never looked to the minimum sentence as a factor in determining whether the right to a jury trial attaches. Indeed, even in contempt cases, where the actual sentence imposed determines whether the accused must have a jury trial, the Court has emphasized that a sentence of no more than six months' imprisonment does not require a trial by jury. *E.g., Muniz* v. *Hoffman,* 422 U.S. 454, 475-476 (1975); *Codispoti* v. *Pennsylvania,* 418 U.S. 506, 511-512 (1974). Consequently, a mandatory two-day jail sentence cannot transform an otherwise petty offense into one that must be tried to a jury.[14]

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[14] We also disagree with the Ninth Circuit's decision in *Craner*, in which that court based its ruling in part on the fact that the penalty for DUI on national park lands was set by the Secretary of the Interior rather than by Congress. From the fact that the offense and its penalty were defined by regulation rather than by statute, the court concluded that the size of the penalty is less important because it does not reflect a legislative judgment that DUI offense on national park grounds is a petty offense. The regulations themselves, however, demonstrate the flaw in that approach. Congress has authorized penalties of up to six months' imprisonment and a $500 fine for regulatory violations in the national parks, 16 U.S.C. 3, three months' imprisonment and a $100 fine for regulatory violations in national military parks and battlefields, 16 U.S.C. 9a, and no imprisonment but a $500 fine for regulatory violations in national historic sites, 16 U.S.C. 462(k). If the *Craner* court is correct, the fact that Congress did not define the crime would require a DUI offense on a national historic site to be tried to a jury even though the offense carried no risk of punishment and a maximum fine of only $500. By extrapolation, the *Craner* court would apparently require a trial by jury even if the maximum penalty were a $15 fine.

A review of current practices among the States, including the District of Columbia, regarding the right to jury trial for a DUI offense shows that 30 jurisdictions have penalties of no more than six months' imprisonment for a first DUI offense.[15] Twenty-two of those States provide for a jury trial in DUI cases, but only two do so solely because they view DUI as a "serious" offense for constitutional purposes despite its petty offense penalty. See *Rothweiler* v. *Superior Court,* 100 Ariz. 37, 41-47, 410 P.2d 479, 483-486 (1966); *State* v. *O'Brien,* 68 Haw. 39, 41-43, 704 P.2d 883, 885-887 (1985).[16] The other 20 States

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[15] The Fifth Circuit, in *Landry* v. *Hoepfner, supra,* recently conducted such a review. See 840 F.2d at 1218-1220. The Fifth Circuit included Puerto Rico in its analysis, but we have chosen to include only the 50 States and the District of Columbia. Petitioners have attached to their brief an appendix that assertedly contains a list of the States that provide jury trials for a DUI offense (Br. App. 1-9). That list is deceptive, however, because it does not show the number of jurisdictions that provide for a jury trial for all criminal offenses, and we disagree with petitioners' analysis with respect to several States. We are attaching as an appendix to this brief a list of how each State, including the District of Columbia, treats DUI offenses.

The *Landry* court's categorization rested on an appendix that we had submitted. See 840 F.2d at 1218 & n.32. We provided incorrect information with respect to Connecticut and Pennsylvania, so the actual breakdown of the States varies slightly from that in *Landry*.

[16] The Wyoming Supreme Court recently held that DUI was a "serious" offense, for constitutional purposes, and that it therefore required a jury trial in a municipal court, even though the applicable local ordinance provided for no penalty of imprisonment. *City of Casper* v. *Cheatham,* 739 P.2d 1222, 1223-1224 (Wyo. 1987). That court, however, already had held that under Wyoming law a defendant had a right to jury trial in any cases where the penalty involved a potential term of imprisonment. *Brenner* v. *City of Casper,* 723 P.2d 558, 561 (Wyo. 1986). Courts in Maryland and South Dakota also have held that a DUI offense is serious. In both States, however, the penalty for DUI is one year in prison. Thus, a defendant would have a right to a

grant a jury trial in all criminal cases or in all cases that carry a potential penalty of imprisonment.[17] Eight jurisdictions, including Nevada, with punishments for DUI not exceeding six months' imprisonment, do not provide for a jury trial.[18]

In the remaining 21 States, the maximum penalty for DUI exceeds six months' imprisonment.[19] Hence, coupled with Arizona, Hawaii, and Wyoming, a total of 24 states consider DUI to be a "serious" offense, for constitutional purposes, while 27 jurisdictions deem DUI to be a petty offense. See App., *infra,* 1a, 5a, 20a; see also 840 F.2d at 1219. As the Fifth Circuit observed (*ibid.*), that ratio "reflects that a clear majority of the jurisdictions * * * classifies [DUI] in a manner which entirely meets the standards of the Supreme Court's definition of 'petty.' " Accordingly, the practice among the States does not support a conclusion that a DUI charge warrants a jury trial when the maximum sentence is six months' imprisonment.

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jury trial irrespective of those decisions. See *Fisher* v. *State,* 305 Md. 357, 504 A.2d 626 (1986); *Parham* v. *Municipal Court,* 86 S.D. 531, 199 N.W.2d 501 (1972); see also App., *infra,* 8a, 17a. By contrast, courts in Florida and Nebraska, States that provide for a jury trial in virtually all criminal cases, have held that a DUI offense does not intrinsically require a jury trial. See *Whirley* v. *State,* 450 So.2d 836 (Fla. 1984); *State* v. *Amick,* 173 Neb. 770, 114 N.W.2d 893 (1962).

[17] California, Connecticut, Florida, Idaho, Kansas, Kentucky, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, North Carolina, Ohio, Oregon, South Carolina, Utah, West Virginia, Wisconsin, and Wyoming all provide either by state constitution or statute for a jury trial in all criminal cases or in all prosecutions involving potential imprisonment. See App., *infra,* 2a-20a.

[18] Those jurisdictions are Delaware, the District of Columbia, Louisiana, Nevada, New Hampshire, New Jersey, New Mexico, and North Dakota. See App., *infra,* 3a-4a, 7a, 11a-14a.

[19] Eleven of those States also provide for jury trial in all criminal cases. Those States include Alaska, Colorado, Illinois, Indiana, Iowa, Maine, Oklahoma, Tennessee, Texas, Vermont, and Washington. See App., *infra,* 1a-2a, 6a, 8a, 15a, 17a-19a.

3. Finally, we submit that the constitutional dividing line that the Court has established has the virtues of predictability and ease of application for the parties. When the jury trial right is conditioned on the length of the potential sentence for an offense, the trial court and the parties know in advance whether a jury trial is required. On the other hand, if a trial court must determine the seriousness of minor offenses on a case-by-case basis, the administration of justice obviously will suffer. The confusion wrought by such a test, requiring either an examination of the nature of the offense or its collateral consequences, will no doubt be immense. The burden is particularly great because it is imposed in a class of cases in which the need for easily applied rules and simplified handling is the greatest. The Court's "fixed dividing line between petty and serious offenses" (*Codispoti* v. *Pennsylvania,* 418 U.S. at 512) remains historically sound, easy to apply, and consistent with contemporary standards. The Court should therefore reaffirm the vitality of that standard for determining whether an offense requires a jury trial.

CONCLUSION

The judgment of the Supreme Court of Nevada should be affirmed.

Respectfully submitted.

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APPENDIX

PENALTIES FOR FIRST OFFENSE DUI AND RIGHT TO JURY TRIAL IN THE STATES AND THE DISTRICT OF COLUMBIA

ALABAMA	Under Ala. Code § 32-5A-191 (Supp. 1987), the maximum penalty is one year in prison and a $1,000 fine. The state right to jury trial applies only to those classes of cases triable to a jury at common law. *Ex parte LeFlore,* 445 So.2d 932, 934 (Ala. 1983).
ALASKA	Under Alaska Stat. §§ 28.35.030 (b), 12.55.035(b)(3), and 12.55.135(a) (1984), the maximum penalty is one year in prison and a $5,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *Baker* v. *City of Fairbanks,* 471 P.2d 386, 401-402 (Alaska 1970).
ARIZONA	Under Ariz. Rev. Stat. Ann. §§ 28-692.01.B, 13-707.A.1, and 13-802.A (1976 & 1978), the maximum penalty is six months' imprisonment and a $1,000 fine. *In Rothweiler* v. *Superior Court,* 100 Ariz. 37, 41-47, 410 P.2d

479, 483-486 (1966), the state supreme court held that DUI was a serious offense that required trial by jury.

ARKANSAS

Under Ark. Stat. Ann. §§5-65-103, 5-65-111(a), and 5-65-112(1) (1987), the maximum penalty is one year in prison and a $1,000 fine.

The state right to jury trial applies only to those classes of cases triable to a jury at common law. *Dunn* v. *Davis,* 725 S.W.2d 853, 855 (Ark. 1987).

CALIFORNIA

Under Cal. Veh. Code §§ 23152 and 23160(a) and Cal. Penal Code § 689 (West 1985), the maximum penalty is six months' imprisonment and a $1,000 fine.

There is a state constitutional right to jury trial for all misdemeanors, including DUI, even though the misdemeanor would be a petty offense under federal law. *Mills* v. *Municipal Court,* 10 Cal.3d 288, 298 & n.8, 515 P.2d 273, 280 & n.8 (1973).

COLORADO

Under Colo. Rev. Stat. §§ 42-4-1202(1)(a) and (4)(a)(I) (19xx), the maximum penalty is one year

in prison and a $1,000 fine.

The state extends the opportunity for a jury trial to all criminal cases. *City of Canon City* v. *Merris,* 137 Colo. 169, 181-182, 323 P.2d 614, 620-621 (1958).

CONNECTICUT

Under Conn. Gen. Stat. §§ 14-227a(a) and (h) (1987), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses, except those where the maximum penalty is a $199 fine. See Conn. Gen. Stat. § 54-82b (Supp. 1988).

DELAWARE

Under Del. Code Ann. tit. 21, §§ 4177(a) and (d)(1) (1985), the maximum penalty is six months' imprisonment and a $1,000 fine.

Contrary to the representation in the appendix to petitioners' brief, the Delaware Supreme Court has held that the right to jury trial applies only to "serious" offenses, both in the first instance (*Van Arsdall* v. *State,* 524 A.2d 3, 9 n.11 (Del. 1987)), and on appeal de novo (*Clements* v. *Family Court,* 401 A.2d 72, 74 (Del. 1979)). A

	serious offense is punishable by more than six months' imprisonment. *Thomas* v. *State,* 331 A.2d 147, 150 (Del. 1975) (applying the *Baldwin* test and overruling the prior state rule that trial by jury is required when the offense carries a punishment of three months' imprisonment).
DISTRICT OF COLUMBIA	Under 40 D.C. Code Ann. § 716(b)(1), the maximum penalty is 90 days' imprisonment and a $300 fine. The District of Columbia courts follow the Court's precedents; the D.C. Court of Appeals has not recognized a constitutional right to jury trial for an offense punishable by no more than six months' imprisonment. By statute, an accused may demand a jury trial where the offense's penalty exceeds 90 days' imprisonment. See *Jackson* v. *United States,* 498 A.2d 185, 187-188 (D.C. 1985).
FLORIDA	Under Fla. Stat. §§ 316.193(1)(a) and (2)(a) (Supp. 1988), the maximum penalty is six months' imprisonment and a $500 fine. The state extends the opportunity for a jury trial to all traffic offenses, including DUI. Fla. Stat. § 316.1934(4) (Supp. 1988).

GEORGIA	Under Ga. Code Ann. §§ 40-6-391(a), 40-6-391(c)(1)(A), and 40-6-391(c)(1)(B) (Supp. 1988), the maximum penalty is one year in prison and a $1,000 fine. Georgia does not recognize a state right to jury trial for petty offenses. *Key* v. *Stewart,* 228 Ga. 516, 517, 186 S.E.2d 739, 740 (1972).
HAWAII	Under Haw. Rev. Stat. §§ 291-4(a) and (b)(1)(C) (1985), the maximum penalty is six months' imprisonment. In *State* v. *O'Brien,* 68 Haw. 39, 41-43, 704 P.2d 883, 885-887 (1985), the state supreme court held that DUI was a serious offense that required trial by jury.
IDAHO	Under Idaho Code §§ 18-8004(1), 18-8005(1)(a), and 18-8005(1)(b) (Supp. 1988), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all criminal offenses, except those not punishable by imprisonment or those punishable

by no more than a $100 fine. See Idaho Code § 19-1902 (1987).

ILLINOIS

Under Ill. Rev. Stat. ch. 95½, paras. 11-501(a) and (c) (Supp. 1988), and ch. 38, para. 1005-1-14 (1982), the maximum penalty is one year in prison.

The state right to jury trial applies to all criminal offenses, including a traffic speeding violation. See Ill. Rev. Stat. ch. 38, paras. 103-6 and 102-15 (1980); *People* v. *Beil,* 76 Ill. App. 3d 924, 927-928, 395 N.E.2d 400, 402-403 (1979).

INDIANA

Under Ind. Code §§ 9-11-2-2 and 35-50-3-2 (1987), the maximum penalty is one year in prison and a $5,000 fine.

The state constitutional right to jury trial applies to all criminal offenses. *Gillespie* v. *Gilmore,* 307 N.E.2d 480, 482-483 (1974).

IOWA

Under Iowa Code §§ 321J.2.1.a, 321J.2.2.a, and 903.1.1.b (Supp. 1988), the maximum penalty is one year in prison and a $1,000 fine.

The state constitutional right to jury trial applies to all criminal offenses. *State* v. *Henderson,*

287 N.W.2d 583, 584-585 (Iowa 1980).

KANSAS

Under Kan. Stat. Ann. §§ 8-1567(a) and (c) (1982), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies, on demand, to all misdemeanor and traffic offenses. See Kan. Stat. Ann. § 22-3404 (1981); *State* v. *Dickson,* 680 P.2d 313 (Kan. 1984).

KENTUCKY

Under Ky. Rev. Stat. Ann. §§ 189A.010(1) and (2)(A) (Michie/Bobbs-Merrill Supp. 1986), the maximum penalty is 30 days' imprisonment and a $500 fine.

The state right to jury trial applies to "all criminal prosecutions, including prosecutions for violation of traffic laws" (Ky. Rev. Stat. Ann. § 29A.270(1) (Michie/Bobbs-Merrill 1985)).

LOUISIANA

Under La. Rev. Stat. Ann. §§ 14:98(A) and (B) (West 1986), the maximum penalty is six months' imprisonment and a $500 fine.

The state right to jury trial applies to those offenses with penalties exceeding six months' imprisonment or a $500 fine. See *State* v. *Henderson*, 491 So.2d 647 (La. 1985).

MAINE

Under Me. Rev. Stat. Ann. tit. 29, §§ 1312-B.1, 1312-B.2, and tit. 17-A, §§ 1252.2D and 1301.3.E (1974), the maximum penalty is one year in prison and a $5,000 fine.

The state right to jury trial applies to all criminal offenses. *State* v. *Freeman*, 487 A.2d 1175, 1179 (Me. 1985).

MARYLAND

Under Md. Transp. Code Ann. §§ 27-101 and 21-902(k)(1) (1982), the maximum penalty is one year in prison and a $1,000 fine.

The state right to jury trial applies to criminal offenses punishable by more than 90 days' imprisonment. In *Fisher* v. *State*, 305 Md. 357, 366-369, 504 A.2d 626, 630-632 (1986), the court held that a DUI defendant was entitled to a jury trial because of the seriousness of the offense even though the prosecutor had agreed not to seek a

penalty of more than 90 days' imprisonment.

MASSACHUSETTS

Under Mass. Gen. L. ch. 90, §§ 21 and 24(1)(a)(1) (1985), the maximum penalty is two years' imprisonment and a $1,000 fine.

There is no state right to jury trial in the first instance for petty offenses. See *Opinion of the Justices*, 271 N.E.2d 335, 336-337 (Mass. 1971). Instead, Massachusetts uses a two-tiered system under which a jury trial may be obtained on appeal. See *Ludwig* v. *Massachusetts*, 427 U.S. 618 (1976).

MICHIGAN

Under Mich. Comp. Laws §§ 257.625(1) and (4) (Supp. 1988), the maximum penalty is 90 days' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses. *People* v. *Goodwin*, 69 Mich. App. 471, 472-474, 245 N.W.2d 96, 96-97 (1976).

MINNESOTA

Under Minn. Stat. §§ 169.121.1, 169.121.4(a), and 609.03(3) (1986), the maximum penalty is 90 days' imprisonment and a $700 fine.

The state constitutional right to jury trial applies to all criminal offenses. *Petersen* v. *Petersen,* 278 Minn. 275, 278-281, 153 N.W.2d 825, 828-830 (1967).

MISSISSIPPI

Under Miss. Code Ann. §§ 63-11-30(1) and (2)(a) (1973), the maximum penalty is one day in prison and a $500 fine.

The state right to jury trial applies, on demand, to petty offenses. *Clark* v. *State,* 332 So.2d 415, 416-417 (1976) (right to jury trial applies to any offense except criminal contempt).

MISSOURI

Under Mo. Rev. Stat. §§ 558.011.1(6), 560.016.1(2), 577.0101, and 577.010.2(1) (1979), the maximum penalty is six months' imprisonment and a $500 fine.

The state constitutional right to jury trial applies to all criminal offenses except violations of municipal ordinances. *State ex rel. Cole* v. *Nigro,* 471 S.W.2d 933, 936-937 (Mo. 1971). A state statute does, however, provide for jury trials in certain municipal courts. See Mo. Rev. Stat. § 479.130 (1987).

MONTANA

Under Mont. Code Ann. § 61-8-722 (1988), the maximum penalty is 10 days' imprisonment and a $500 fine.

The state right to jury trial applies to all criminal offenses. Mont. Code Ann. §§ 46-17-201 and 46-17-403 (1986).

NEBRASKA

Under Neb. Rev. Stat. §§ 39-669.07 and 28-106(1) (1984), the maximum penalty is seven days' imprisonment and a $200 fine.

The state right to jury trial applies to all criminal offenses. *State* v. *Karel,* 204 Neb. 573, 574-577, 284 N.W.2d 12, 13-14 (1979).

NEW HAMPSHIRE

Under N.H. Rev. Stat. Ann. §§ 265:82 and 265:82-b.I.(a) (1982 & Supp. 1987), the maximum penalty for the "violation" is a $1,000 fine. (By the decision of the state supreme court, see *infra,* the maximum penalty is a $500 fine.)

Contrary to petitioners' claim in the appendix to their brief, under New Hampshire law there is no right to jury trial for a DUI offense. The state supreme court

held in *State* v. *Morrill*, 465 A.2d 882, 884-886 (N.H. 1983), that the DUI offense was a "violation," not a crime, and thus there was no right to jury trial. The court also followed the *Baldwin* test and concluded that there was no federal constitutional right to trial by jury for a DUI offense (see *id.* at 884-885). The court reduced the maximum fine to $500, the limit under state practice for triggering a right to jury trial in civil cases (see *id.* at 885-886). Finally, the court pointed out that the legislature in 1973 had eliminated any right to jury trial on a de novo appeal from a conviction for a violation (see *id.* at 884).

NEW JERSEY	Under N.J. Rev. Stat. §§ 39:4-50(a) and (1) (Supp. 1988), the maximum penalty is 30 days' imprisonment and a $400 fine. The state right to jury trial does not apply to petty offenses such as DUI; an offense is deemed petty solely by the length of the potential sentence. *State* v. *Linnehan*, 197 N.J. Super. 41, 43-44, 484 A.2d 34, 35 (App. Div. 1984), cert. denied, 491 A.2d 723 (N.J. 1985).

NEW MEXICO	Under New Mex. Stat. Ann. §§ 66-8-102.A and .D (1988), the maximum penalty is 90 days' imprisonment and a $500 fine. There is no state right to jury trial for a DUI offense. *State* v. *Sweat*, 78 N.M. 512, 513-514, 433 P.2d 229, 230-231 (1967).
NEW YORK	Under N.Y. Veh. & Traf. Law §§ 1192.2 and .5 (McKinney 1986 & Supp. 1988), the maximum penalty is one year in prison and a $500 fine. In New York, the right to jury trial is determined by the length of the potential sentence, with the *Baldwin* bright-line test as the dividing line. *Morgenthau* v. *Erlbaum*, 59 N.Y.2d 143, 153-154, 451 N.E.2d 150, 156 (1983).
NORTH CAROLINA	Under N.C. Gen. Stat. §§ 20-138.1(a) and 20-179(i) (1983), the maximum penalty is six months' imprisonment and a $500 fine. The state right to jury trial applies to all criminal offenses. *State* v. *Field*, 75 N.C. App. 647, 648, 331 S.E.2d 221, 222 (1985).

NORTH DAKOTA	Under N.D. Cent. Code §§ 39-08-01.1, 39-08-01.2, and 12.1-32-01 (1987), the maximum penalty is 30 days' imprisonment and a $500 fine. Contrary to petitioners' claim in the appendix to their brief, the state constitutional right to jury trial applies only to those cases triable to a jury when the state constitution was adopted in 1889. *In Interest of R.Z.*, 415 N.W.2d 486, 488 n.1 (N.D. 1987). There is no right to jury trial in municipal court, although a defendant can obtain a jury trial on appeal to the county court. *City of Bismarck* v. *Altevogt*, 353 N.W.2d 760, 764-766 (N.D. 1984).
OHIO	Under Ohio Rev. Code Ann. §§ 4511.99(A)(1) and 2929.21(B)(1) (Page's Supp. 1987), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *City of Lima* v. *Rambo*, 113 Ohio App. 158, 161-162, 177 N.E.2d 554, 555-556 (1960).

OKLAHOMA	Under Okla. Stat. tit. 47, §§ 11-902(A) and (C) (1988), the maximum penalty is one year in prison and a $1,000 fine. The state right to jury trial applies to all offenses punishable by imprisonment. *Murrah* v. *City of Oklahoma City*, 620 P.2d 1335, 1338 (Okla. Crim. App. 1980).
OREGON	Under Or. Rev. Stat. §§ 153.505., 153.615(2)(a), and 153.623(24) (1987), the maximum penalty for the "traffic infraction" is a $500 fine. Despite the legislature's treatment of DUI, the Oregon Supreme Court concluded that DUI retained aspects associated with crimes and thus a DUI charge must be tried to a jury, as would other state criminal offenses. *Brown* v. *Multnomah County District Court*, 280 Or. 95, 101-109, 570 P.2d 52, 55-60 (1977).
PENNSYLVANIA	Under 75 Pa. Cons. Stat. §§ 3731(a) and (e), 42 Pa. Cons. Stat. § 9721, and 18 Pa. Cons. Stat. §§ 1101(4) and 1104(2) (1982 & Supp. 1988), the maximum penalty is two years' imprisonment and a $5,000 fine.

Under state law an offense punishable by no more than six months' imprisonment does not require a jury trial. *Commonwealth* v. *Fischl,* 525 A.2d 775, 777 (Pa. Super. 1987).

RHODE ISLAND

Under R.I. Gen. Laws §§ 31-27-2(a) and (d)(1) (Supp. 1987), the maximum penalty is one year in prison and a $100 fine.

The state right to jury trial applies only to those offenses triable to a jury when the state constitution was adopted in 1842, namely, any offense that is "criminal" in nature. As a result, a person charged with a petty offense has a right to jury trial on appeal. *State* v. *Vinagro,* 433 A.2d 945, 946-947 (R.I. 1981).

SOUTH CAROLINA

Under S.C. Code Ann. §§ 56-5-2930 and 56-5-2940 (1) (Law. Co-op. Supp. 1987), the maximum penalty is 30 days' imprisonment and a $200 fine.

The state right to jury trial applies, on demand, to all criminal offenses. S. C. Code Ann. § 22-2-150 (Supp. 1987); see *United States* v. *Jenkins,* 780 F.2d 472, 474-475 (4th Cir. 1986).

SOUTH DAKOTA

Under S.D. Codified Laws Ann. §§ 32-23-1, 33-23-2, and

22-6-2(1)(Supp 1988), the maximum penalty is one year in prison and a $1,000 fine.

In *Parham* v. *Municipal Court,* 86 S.D. 531, 538, 199 N.W.2d 501, 505 (1972), the state supreme court held that the defendant, who was charged with DUI under a municipal ordinance, was entitled to a jury trial because the crime was "serious."

TENNESSEE

Under Tenn. Code Ann. §§ 55-10-401(a) and 55-10-403(a)(1) (Supp. 1987), the maximum penalty is imprisonment for 11 months and 29 days, and a $1,000 fine.

The state constitutional right to jury trial applies to all misdemeanor offenses. *State* v. *Morgan,* 598 S.W.2d 796, 797-798 (Tenn. Crim. App. 1979).

TEXAS

Under Tex. Traffic Reg. Code Ann. §§ 67011-1(b) and (c) (Vernon Supp. 1988), the maximum penalty is two years' imprisonment and a $2,000 fine.

The state right to jury trials applies to all criminal offenses.

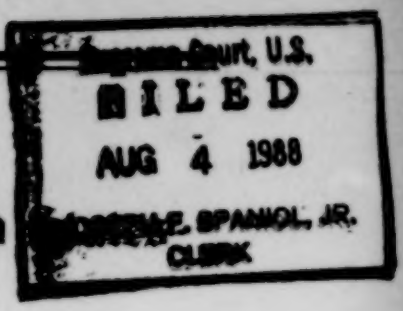
	Franklin v. *State,* 576 S.W.2d 621, 623 (Tex. 1978).
UTAH	Under Utah Code Ann. §§ 41-6-44, 76-3-204, and 76-3-301 (1953 & Supp. 1987), the maximum penalty is six months' imprisonment and a $1,000 fine. The state right to jury trial applies to all criminal offenses, including those tried before nonrecord justice courts. See Utah Code Ann. §§ 78-46-5, 78-1-1, 78-5-1 (Supp. 1987).
VERMONT	Under Vt. Stat. Ann. tit. 23, §§ 1201(a) and 1210(b) (1987), the maximum penalty is one year in prison and a $750 fine. The state right to jury trial applies to all criminal offenses. *State* v. *Becker,* 130 Vt. 153, 154-155, 287 A.2d 580, 582 (1972).
VIRGINIA	Under Va. Code Ann. § 18.2-270 (1988), the maximum penalty is one year in prison and a $1,000 fine. Virginia does not recognize a state right to jury trial in the first instance for a petty offense, but one is obtainable on de novo ap-

	peal. *Manns* v. *Commonwealth,* 213 Va. 322, 323-324, 191 S.E.2d 810, 811-812 (1972).
WASHINGTON	Under Wash. Rev. Code §§ 46.61.502 and 46.61.515 (1970 & Supp. 1988), the maximum penalty is one year in prison and a $500 fine. The state right to jury trial applies to all criminal offenses. *City of Pasco* v. *Mace,* 98 Wash.2d 87, 99-100, 653 P.2d 618, 625 (1983).
WEST VIRGINIA	Under W.Va. Code §§ 17C-5-2 (d)(1) and (2) (Supp. 1988), the maximum penalty is six months' imprisonment and a $500 fine. The state constitutional right to jury trial applies to any offense punishable by imprisonment. *Scott* v. *McGhee,* 324 S.E.2d 710, 713 (W.Va. 1984).
WISCONSIN	Under Wis. Stat. §§ 346.63(1) and 346.65(2)(b) (Supp. 1987-1988), the maximum penalty is a $1,000 fine. The state right to jury trial applies to all criminal offenses. See *State* v. *Voss,* 34 Wis.2d 501, 149 N.W.2d 595 (1967).

WYOMING	Under Wyo. Stat. §§ 31-5-233(a) and (d) (Supp. 1987), the maximum penalty is six months' imprisonment and a $750 fine. The state constitutional right to jury trial applies to any offense punishable by imprisonment. *Brenner* v. *City of Casper*, 723 P.2d 558, 561 (Wyo. 1986). The state supreme court also recently held that a municipality that had eliminated imprisonment as a penalty for DUI must still provide a jury trial because the offense was "serious." *City of Casper* v. *Cheatam*, 739 P.2d 1222, 1223-1224 (Wyo. 1987).

(7)

No. 87-1437



IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON and MARK D. FRALEY,

Petitioners,

—v.—

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF THE STATE OF NEVADA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NEVADA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the Bill of Rights and advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Nevada is one of the ACLU's state affiliates.

This case presents the question whether the constitutional protection of a trial by jury should be afforded to individuals accused of driving while under the influence of alcohol, who are facing serious deprivations of liberty and property, including incarceration and

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1/ Pursuant to Rule 36.2 of the Rules of this Court, letters of consent from the parties have been filed with the Clerk of the Court.

monetary sanctions. Amici believe that persons accused of serious criminal offenses possess a fundamental constitutional right to be tried by a jury, and that the decisions of this Court support the recognition of this right in the instant case. Accordingly, we submit this brief in support of Petitioners, and we urge the Court to reverse the decision of the court below.

STATEMENT OF THE CASE[2/]

Petitioner Melvin R. Blanton was accused of driving while under the influence of alcohol ("DUI"). Following the denial of his request for jury trial of the charges against him, Petitioner filed a petition for writ of mandamus. The Eighth Judicial District Court of Nevada denied Blanton's petition for writ of mandamus, and he appealed to the Nevada Supreme Court.[3/] Petitioner Mark D. Fraley, like Blanton, was charged with DUI, but following the denial of his motion for jury trial he pled guilty. Fraley was sentenced to a period of incarceration and was

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2/ Amici adopt the Statement of the Case set forth in Petitioner's Brief, but here highlight the facts most relevant to the argument presented infra.

3/ See generally Joint Appendix (hereafter "J.A.") at 6, 13-15, 20-23.

ordered to pay a fine by the North Las Vegas Municipal Court.[4] Fraley subsequently challenged his conviction on the ground that the denial of a jury trial violated his federal constitutional rights. Fraley's appeal to the Eighth Judicial District Court was successful, and his case was remanded to the municipal court, with instructions to conduct a jury trial.[5] The City of North Las Vegas, Nevada appealed the District Court's decision, however, and the Nevada Supreme Court granted the City's petition for review.[6] The Nevada Supreme Court summarily rejected petitioners' argument that the denial of jury trials on their DUI charges violated

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4/ J.A. at 1.

5/ J.A. at 25-27.

6/ J.A. at 28-52, 101.

their constitutional rights and concluded that since state law "provide[d] a penalty of . . . six months imprisonment [or less] for a first-time DUI offense, there is no constitutional right to a trial by jury." Blanton v. North Las Vegas, 748 P.2d 292, 299 (Nev. 1987). This Court granted certiorari on June 20, 1988.[7]

SUMMARY OF ARGUMENT

The right to jury trial is a fundamental constitutional right which extends to all persons accused of committing serious crimes. The offense of driving while under the influence of alcohol is a serious crime in Nevada and thus, such cases must be tried by jury upon the demand of the accused in order to meet the requirements

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7/ J.A. at 102-03.

of the United States Constitution. The decisions of this Court provide that: (1) an individual accused of a serious criminal offense must be afforded the opportunity to be tried by a jury; (2) where the jury trial right is not statutorily mandated, the assessment of the seriousness of the offense, and hence, the determination whether a specific offense must be tried by jury upon the defendant's demand, must be conducted by the courts on a case-by-case basis; and (3) to determine whether an offense is "serious," a court must consider the maximum authorized period of imprisonment, along with a number of other factors including the collateral consequences accompanying the conviction, the intrinsic nature of, and the societal condemnation attendant to, the particular offense, as

reflected in the nature and type of sanctions imposed upon conviction.

This Court has recognized that the length of the maximum statutorily authorized sentence is not the sole determinant of the seriousness of an offense for purposes of deciding whether a state may avoid the constitutional criminal jury trial requirement. Nevertheless, the Court below relied exclusively upon the length of sentence to determine whether Petitioners were entitled to a jury trial. Under the tests articulated by this Court, the offense of driving while under the influence of alcohol is a serious offense in Nevada. Thus, the decision below, which deprived petitioners of the jury trials they requested, contravenes the requirements of the United States Constitution and should be reversed by this Court.

ARGUMENT

I. AN INDIVIDUAL ACCUSED OF A SERIOUS CRIMINAL OFFENSE IS CONSTITUTIONALLY GUARANTEED THE RIGHT TO BE TRIED BY A JURY.

A. The Criminal Defendant's Right To A Jury Trial Is A Fundamental Right Guaranteed By The Sixth Amendment To The Constitution.

The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury."[8] This Court has recognized that "[t]he right to jury trial in criminal cases...[is] fundamental to our system of justice." Duncan v. Louisiana, 391 U.S. 145, 153-54 (1968). The criminal defendant's right to be tried by a jury upon demand is significant because it

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8/ U.S. Const. Amend. VI. See also U.S. Const. Art. III, § 2, cl. 3 ("The Trial of all Crimes...shall be by jury.").

> prevent[s] the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are . . . less likely to function or appear as but another arm of the Government that has proceeded against him.

Baldwin v. New York, 399 U.S. 66, 72 (1970). This nation has "a long tradition [of] attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement,"[9] and this tradition is clearly reflected in the Sixth Amendment to the Constitution.[10]

9/ Williams v. Florida, 399 U.S. 78, 87 (1970).

10/ Some commentators have described the right to trial by jury in criminal cases as "enshrined" in the Sixth Amendment. H. Kalven & H. Zeisel, The American Jury 15 (1966). Another commentator has noted that "[e]nthusiasm for the jury" predated the ratification of the Sixth Amendment, as demonstrated by the remark of one observer in 1788 that the "jury was 'adapted to the

(continued...)

Accordingly, this Court has recognized that the right to criminal jury trial, which is "'basic in our system of jurisprudence'"11/ and "'essential to a fair trial,'"12/ extends to defendants in the state courts as well as in the federal courts, and is "protected against" incursions by the state and federal governments. 391 U.S. at 148-49.

On its face, the Sixth Amendment does not admit any exception for "petty"

10/ (...continued)
investigation of truth beyond any other [system] the world can produce.'" Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 171-72 (1964) (quoting Gerry, Observations on the New Constitution (1788), reprinted in 2 Federalist and Other Constitutional Papers 714, 720 (Scott ed. 1894)).

11/ Duncan v. Louisiana, 391 U.S. at 149 (quoting In re Oliver, 333 U.S. 257, 273 (1948)).

12/ Duncan, id., (quoting Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963)).

crimes.13/ Nevertheless the Court has recognized an exception for a category of offenses that are, on the basis of several criteria, deemed petty. See Baldwin v. New York, 399 U.S. at 71-72. In such cases, a jury trial is not constitutionally required.

This Court first discussed the issue of the right to jury trial for minor offenses in Callan v. Wilson, 127 U.S. 540 (1888). There the Court vacated a police court conviction of conspiracy which carried a sentence of a $25 fine or thirty days in jail. In Callan, the Court

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13/ Indeed, Justices Black and Douglas were of the view that the Sixth Amendment and Article III, Section 2, made no distinction between "petty" and "serious" crimes. Baldwin v. New York, 399 U.S. 66, 69. As Justice White noted in Baldwin, the legal distinction may be unpersuasive to the accused since "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter." Id. at 71.

observed, in dictum, that there was a class of offenses "not of the class or grade triable at common law by a jury" that could be considered "petty" and thus, could be tried without a jury in federal court. However, the Court concluded that conspiracy was an offense indictable at common law, and thus, the right to jury trial could not be bypassed in such cases. 127 U.S. at 555.14/ Eventually, the Court was squarely presented with the issue of whether the denial of a jury trial for persons accused of offenses characterized as "petty" constituted a violation of the

14/ Significantly, the relative brevity of the period of incarceration imposed in Callan did not deter the Court from holding that the jury trial right extended to the conspiracy charge involved there.

Sixth Amendment. See District of Columbia v. Clawans, 300 U.S. 617 (1937).15/

Even with the exception for petty offenses, this Court has recognized that "[t]rial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.'"16/ This Court has never rejected the premise that "the right of the accused to a trial by . . . jury [must] be jealously preserved,"17/ and, for the reasons set forth more fully infra, the case now before the Court is one

15/ In dicta, the Court addressed the issue in several cases between 1888 and 1937. See Natal v. State of Louisiana, 139 U.S. 621 (1891); Schick v. United States, 195 U.S. 65 (1904); District of Columbia v. Colts, 282 U.S. 63 (1930).

16/ Singer v. United States, 380 U.S. 24, 35 (1965), (quoting Patton v. United States, 281 U.S. 276, 312 (1930)).

17/ Patton v. United States, 281 U.S. 276, 312 (1930).

which demands and deserves this Court's intervention to preserve this important constitutional right.

B. The Right To Jury Trial Extends To All Persons Accused Of Committing Serious Criminal Offenses And The Maximum Authorized Term Of Imprisonment Is One Among Several Indicia Of The Seriousness Of The Offense For Sixth Amendment Purposes.

The decisions of this Court have provided useful guidance for determining whether an offense is petty or serious for the purposes of the Sixth Amendment. This Court has developed a three-part test for evaluating the severity of an offense. The essential elements of that structure include consideration of: (1) whether a crime is serious, either intrinsically or as a result of the gravity of potential penalties; (2) whether an intrinsically serious crime has been or could be

classified as petty by mere reduction of the sentence imposed; and (3) whether an intrinsically petty crime has developed into a serious one due to an escalation of the authorized penalties. Courts, not legislators or prosecutors, are the accepted and proper arbiters of whether the Sixth Amendment requires a jury trial for any given offense. Courts are vested with the constitutional task of assessing whether a crime is serious or petty. As stated by the Court in Duncan v. Louisiana:

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance.

391 U.S. at 160. As the Ninth Circuit Court of Appeals has observed, in the absence of judicial action, "the constitutional right to a jury trial would exist only at the sufferance of the legislative branch." United States v. Craner, 652 F.2d 23, 25 (1981).

The evaluation of whether the offense is intrinsically serious requires consideration of three factors: (1) whether the crime is indictable at common law; (2) whether the offense is malum in se; and (3) whether the offense involves moral delinquency or turpitude. Crimes indictable at common law are uniformly regarded as serious, despite the insignificance of the penalty attached. See, e.g., Callan v. Wilson, 127 U.S. at 555-557 (conspiracy held to be a serious offense despite assessed sentence of thirty days in

prison). Crimes mala in se are similarly deemed serious despite relatively brief authorized sentences to be imposed upon a finding of violation of the relevant law.[18/] See, e.g., District of Columbia v. Colts, 282 U.S. at 73-74 (reckless driving is malum in se and thus requires jury trial notwithstanding penalty limited to $300 fine or ninety days imprisonment). Cf. District of Columbia v. Clawans, 300 U.S. at 625 (holding that license violation was a morally inoffensive mala prohibita offense, and thus was not triable by jury).

18/ In contrast, offenses mala prohibita were deemed petty and could be summarily tried. See, e.g., Schick v. United States, 195 U.S. at 67 (failure to brand and stamp oleomargarine characteristic of crimes mala prohibita); and Natal v. Louisiana, 139 U.S. at 624 (prohibition on location of private markets characteristic of crimes mala prohibita).

If the offense is not, by its nature, serious, then this Court instructs that the next consideration is whether the sentence imposed is sufficiently serious to elevate the offense from the "petty" to "serious" category. In Schick v. United States, this Court indicated that a crime petty by nature could rise to the level of "serious" solely on the basis of the sentence imposed. 195 U.S. at 67-68. That view was reaffirmed in District of Columbia v. Clawans:

> [T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.

300 U.S. at 625.

In a spate of decisions between 1966 and 1970, a number of which concerned sanctions for criminal contempt, the Court refined and elaborated upon the aforementioned analysis without departing from the basic principles. The analysis of criminal contempt proceeded along the conventional lines. The Court inquired whether contempt was by its nature serious, and if not, whether the penalty authorized was sufficiently long to make it so.

In Cheff v. Schnackenberg, 384 U.S. 373 (1966), the Court affirmed that criminal contempt is not a crime which is per se serious. "[C]riminal contempt, intrinsically and aside from the particular penalty imposed [is] not deemed a serious offense requiring the protection of the constitutional guarantees of the right to

jury trial." Id. at 378-80.19/ However, even criminal contempt is no longer viewed as petty if it carries a potential penalty of more than six months. Bloom v. Illinois, 391 U.S. 194 (1968). See also Dyke v. Taylor Implement Co., 391 U.S. 216 (1968).

In Duncan v. Louisiana, this Court elaborated upon the significance of the maximum authorized sentence (as contrasted with the sentence actually imposed or served) as a relevant criterion for establishing the severity of an offense.20/

19/ Cf. Williams v. Florida, 399 U.S. 78, 121 n.7 (1970) (Harlan, J., concurring in part and dissenting in part) ("In Clawans, the Court held the severity of punishment was not determinative when the offense by its own nature is not considered grave.... [In Callan v. Wilson, 127 U.S. 540, 556 and Schick v. United States, 195 U.S. 65], this Court noted that the 'nature' of the offense and the severity of punishment are two distinct considerations.") (emphasis supplied).

20/ See Duncan, 391 U.S. at 160.

In Duncan, the defendant was sentenced to 60 days imprisonment for "simple battery," but imprisonment for up to two years was authorized by the applicable statute. This Court found that the conviction violated the Constitution, and held that "the penalty authorized for a particular crime ... may in itself, if serious enough, subject the trial to the mandates of the Sixth Amendment."21/ The Court added that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." Id. at 159 (emphasis supplied). Significantly, though, Duncan does not identify the severity of sentence as the sole factor for assessing the seriousness of an offense, and the concomitant trial

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21/ Duncan v. Louisiana, 391 U.S. at 159.

procedures to be extended to persons charged with the offense. "While this Court has said that the most significant index to the seriousness of an offense if the degree of penalty that attaches ... this is not alone determinative .... [T]he 'apportioned punishment [at common law] was both a consequence of the ... quality of the misconduct and an index of the community's moral judgment upon it.'" Williams v. Florida, 399 U.S. at 121 n.7 (Harlan, J., concurring in part and dissenting in part) (1970) (quoting Frankfurter & Corcoron, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L.Rev. 917, 980 (1926)) (emphasis supplied).

While Duncan held that in some cases "the length of the authorized prison term or the seriousness of other punishment is

enough in itself to require a jury trial,"[22] it does not affect the corollary principle that even offenses bearing shorter potential terms of imprisonment may also be serious crimes, thereby requiring the attendant procedural guarantees extended to persons accused of committing them. See also, Frank v. United States, 395 U.S. 147 (1969); Baldwin v. New York, 399 U.S. 66 (1970).

Baldwin v. New York, id., held that any crime carrying a maximum authorized sentence of more than six months is necessarily serious. This bright-line standard for assessing the severity of an offense was first suggested in Cheff v. Schnackenberg, 384 U.S. 373, where this Court, relying upon its supervisory power,

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22/ 391 U.S. at 161.

imposed a six-month limit on sentences imposed by federal courts in contempt proceedings. In Baldwin v. New York, the Court squarely addressed the issue, holding that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69 (emphasis supplied).

This Court has repeatedly adhered to the basic principle that the Sixth Amendment assessment of the seriousness of a crime depends upon its intrinsic nature as well as the severity of the maximum authorized penalty.[23/] Finally, a crime

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23/ In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held that petty contempt could be tried without a jury.

Codispoti acknowledged that a majority of the Court had never agreed that sentences of six months or less were necessarily petty. Id. at 512 n.4. Noting that two members of the Court in Baldwin believed that jury trials were required in

(continued...)

serious by nature may not be made petty merely by reducing the maximum authorized

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23/ (...continued)
all criminal prosecutions, the Court noted in Codispoti that the Baldwin majority had agreed only that crimes carrying sentences exceeding six months were certainly serious. Id. The converse had not been decided in Baldwin. Thus, Codispoti's implication that this Court's decisions "have established a fixed dividing line between petty and serious offenses" must be considered against the background of the Court's continued adherence to considering the nature as well as the seriousness of the offense. Id., at 511-12 (citing Frank v. United States, 395 U.S. at 149-50, and Baldwin v. New York, 399 U.S. at 69).

Significantly, two cases decided after Codispoti reaffirm the Court's long tradition of examining the nature of the offense as well as the penalty authorized. In Muniz v. Hoffman, 422 U.S. 454, (1975), Justice White wrote that criminal contempt, "in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary." 422 U.S. at 476 (emphasis supplied). In Ludwig v. Massachusetts, 427 U.S. 618, (1976), the Court upheld Massachusetts' two-tier system of trial courts and noted that a petty offense is "usually defined by reference to the maximum punishment that might be imposed" 427 U.S. at 624-625 (emphasis supplied). Both opinions thus indicate the possibility that a petty offense could be converted into a serious one by legislative declaration.

sentence,[24] and a crime petty by nature could be made serious by increasing the maximum sentence.[25] Thus, it is clear that the severity of a crime depends upon both the nature of the offense and the penalty imposed.

The most significant doctrinal development in the judicial process of establishing the boundaries required by Duncan has been the evolution of objective standards for evaluating the severity of an offense. This Court suggested in Baldwin that in deciding whether an offense is "petty" or "serious," courts should look to objective criteria reflecting the

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24/ Cf. Baldwin v. New York, 399 U.S. at 76 n.2 (Black, J., concurring) ("[W]hen the sanction [imposed against an individual] bears all the indicia of a criminal punishment, a jury trial cannot be denied by labeling the punishment 'petty.'").

25/ See supra note 23.

seriousness with which society regards the offense. Baldwin also indicates that the maximum authorized length of imprisonment is a relevant objective criterion. However, the maximum authorized sentence is but one objective criterion, and the courts must look to all the relevant criteria in each particular case. The additional measures of the severity of a crime, as is clear from the Court's opinions dating back to 1888, are based upon four factors: historical and federal practices, collateral consequences, and contemporary responses to criminal acts.

An example of the importance of historical practice is the tradition of punishment for contempt of court. The fact that for centuries contempt has been summarily punished weighed heavily in the Court's conclusion that contempt was not

intrinsically serious. See Green v. United States, 356 U.S. 165, 183 n.14 (1958); United States v. Barnett, 376 U.S. 681, 692-700 (1964). See also District of Columbia v. Clawans, 300 U.S. at 625-26 (discussing standards prevailing at time of adoption of Constitution as a guidepost for the Sixth Amendment assessment of the seriousness of an offense).

Similarly, the federal practice of defining petty offenses as the category of offenses punishable by not more than six months imprisonment and a $500 fine influenced this Court's decision that the right to jury trial must be extended to a person accused of committing crime for which the authorized sentence exceeded six months. See Duncan v. Louisiana, 391 U.S. at 161.

Another important consideration is whether serious collateral consequences attend conviction for the offense. In Baldwin, Justice White examined the collateral consequences in assessing the gravity of conviction for felonies and misdemeanors and in establishing "that some misdemeanors are also 'serious' offenses."[26/] Lower federal courts[27/] and state courts[28/] have also considered the collateral consequences in assessing the

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26/ 399 U.S. at 70. See generally id. at 69 n.8; see also District of Columbia v. Clawans, 300 U.S. at 628 (practices of community taken as gauge of its social and ethical judgments).

27/ See, e.g., United States v. Craner, 652 F.2d 23, 25-26 (9th Cir. 1981).

28/ See, e.g., State v. Wilke, 291 N.W.2d 793, 794, (S.D. 1980) ("To determine whether a crime is serious or petty, we look to ... whether society views the offense with sufficient opprobrium, and the consequences of conviction."); Baker v. City of Fairbanks, 471 P.2d 386, 395, 401 (Alaska 1970) ("[c]ollateral consequences to the accused are reflected by our mores and standards.").

constitutional necessity of providing a jury trial.

Finally, the Court has relied heavily on the sanctions currently imposed for the criminal offense. For instance, in Duncan v. Louisiana, the Court examined other states' practices in punishing simple battery. 391 U.S. at 161. See also Baldwin v. New York, 399 U.S. at 70-71 (practices of states relevant to six month rule).

The Ninth Circuit held in United States v. Craner, 652 F.2d 23, that driving under the influence of alcohol in a national park was a serious offense, even though it carried a six months maximum sentence. The court stated:

> The extent of possible punishment does not, however, alone determine whether an offense is serious or petty. Otherwise the constitutional rights to a jury trial would exist only at the sufferance of the legislative branch.

> ....
> To gauge the seriousness of an offense, the Supreme Court has in recent years looked to the authorized penalty and to the "relevant rules and practices followed by the federal and state regimes."
> ....
> [In addition,] consideration of the future [collateral consequences] of conviction [is relevant] in deciding whether an offense is a serious one (emphasis supplied) (citations omitted).

Id. at 25-26.[29/]

State courts are also in agreement with the Ninth Circuit. A thorough consideration of the issue appears in State v. Wilke, where the Court stated:

> To determine whether a crime is serious or petty, we look to the maximum punishment ... and the nature of the offense, and consider its common law background

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29/ See also United States v. Stewart, 568 F.2d 501 (6th Cir. 1978); United States v. Sanchez-Mesa, 547 F.2d 461 (9th Cir. 1976); United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978); and Brady v. Blair, 427 F. Supp. 5 (S.D. Ohio 1976).

> ..., whether society views the offense with sufficient opprobrium, and the consequences of conviction.30/

291 N.W.2d at 794.

In District of Columbia v. Clawans, 300 U.S. 617, the Court examined a District of Columbia statute that proscribed engaging in the business of selling second-hand property (in that case, the unused portion of a railway excursion ticket) without a license. The Court held that the offense was "at most but an infringement of local police regulations, and its moral quality is relatively inoffensive." 300 U.S. at 625. Indeed, such would probably be most people's definition of a petty

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30/ See also Bruce v. State, 614 P.2d 813, 815, 126 Ariz. 271, 273 (1980) ("Other criteria include whether the offense was classified as a crime at common law as well as the moral quality of the act."); People v. Oppenheimer, 42 Cal.App. 3d Supp. 4, 8 n.6, 116 Cal.Rptr. 795 (Cal.Super. 1974) (noting that Codispoti spoke of contempt only).

crime today. In contrast, however, a DUI charge in Nevada is hardly a "relatively inoffensive" transgression of "local police regulations." With the mandatory jail sentence for first offenders, automatic revocation of driver's license, increasing penalties and imprisonment, not to mention the economic sanctions and great public opprobrium brought down upon the offender, it cannot be said to be a "petty" offense.

II. DRIVING UNDER THE INFLUENCE OF ALCOHOL IS A SERIOUS CRIMINAL OFFENSE IN NEVADA, AND THERE IS NO JUSTIFICATION FOR THE DENIAL OF PETITIONERS' FUNDAMENTAL RIGHT TO BE TRIED BY A JURY ON THESE CHARGES.

A. Applying The Standards Articulated In The Decisions Of This Court, It Is Clear That The Offense Of Driving While Under The Influence of Alcohol Is A Serious Offense In Nevada.

Driving under the influence is a serious problem nationwide, as this Court

has observed. "The carnage caused by drunk drivers is well documented.... This Court ... has repeatedly lamented the tragedy."[31/] The nature of the offense itself, the harsh collateral consequences attendant to DUI conviction, and the fact that the penalty for the offense includes mandatory imprisonment reflect the seriousness of the crime in Nevada.[32/]

Nevada, like the rest of the nation, has recognized that DUI is a serious offense and has acted to impose more severe sanctions for violation of its laws against drunk driving. "The Legislature passed [a] stiffer DUI law in 1983, calling for a

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31/ South Dakota v. Neville, 459 U.S. 553, 558-59 (1983). See also Breithaupt v. Abram, 352 U.S. 432, 439 (1957); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring); Mackey v. Montrym, 443 U.S. 1, 17-19 (1979).

32/ See Bronson v. Swinney, 648 F.Supp. 1094 (D. Nev. 1986).

mandatory minimum two-day jail sentence or 48 hours of public service for first-time offenders. It was one of the strictest anti-DUI laws in the nation."[33/] The 1981 statistics on alcohol-related traffic fatalities in Nevada afforded Nevada the unenviable distinction of "rank[ing] first among the states in fatal traffic accidents for the number of miles driven."[34/] Such statistics reportedly prompted the 1983 and 1985 state legislative efforts to enact "tougher DUI laws" and to "crack [ ] down on drunk driving offenses."[35/] Such legis-

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33/ Phillis, Officials Fear Tougher Laws Losing Punch, Reno Gazzette-Journal, April 18, 1988, at 1C.

34/ Legislative Commission of the Legislative Counsel Bureau of the State of Nevada, Driving While Intoxicated, Bull.No. 83-7 at 1 (1982).

35/ Morrison, Tougher Laws Have Slight Effect on DUI Deaths, Reno Gazzette-Journal, November 22, 1987, at 17A. In addition, "[T]he 1987 Legislature passed laws allowing police to take blood samples

(continued...)

lative efforts reflect the prevailing sentiment in Nevada that DUI is a serious offense.

In Nevada, a first DUI offense is serious, even though labelled a misdemeanor. Nevada Revised Statutes §484.3792 (1983) provides that, for a first offense DUI, the court shall:[36]

> (1) Order the offender to pay tuition for an educational course on the abuse of alcohol and controlled substances;[37]
> (2) Unless the sentence is reduced pursuant to Nev. Rev. Stat. 484.3794, sentence him to imprisonment for not less than two days nor more than six months in jail, or to perform forty-eight hours work for the community while dressed in distinctive garb that identifies him as a DUI offender; and (3) Fine him not less than $200 nor more than $1,000.

The educational course, mandatory jail time and mandatory fine of $200 to $1,000, were added to the statute by amendment in 1983.[38] Additionally, the Nevada law provides:

> 3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or

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35/ (...continued)
the second time someone is arrested for DUI." Id.

36/ The only statutory alternative allowed for first-time DUI offenders is to agree to undergo a treatment program, lasting for at least one year. See Nev. Rev. Stat. § 484.3794 (1983). However, even these offenders are subject to mandatory incarceration or community service for twenty-four hours. Nev. Rev. Stat. § 484.3794(1)(c)(1).

37/ The teacher of the educational course is to report back to the court if he or she believes the offender is an abuser of alcohol or controlled substances. The statute does not provide what use the court will make of the information.

38/ See 1983 Nev. Stat. 1068-72.

cannot be proved at the time of trial.[39]

As noted in Bronson v. Swinney, 648 F.Supp. 1094 (D.Nev.1986), statutory limitations on prosecutorial and judicial discretion are exceptional, and a misdemeanor criminal statute with a mandatory jail term is quite unusual. "Even some of the most heinous crimes are not punishable by mandatory imprisonment without the possibility of release on probation." Id. at 1099. In making a decision as to whether a crime is petty or serious, courts are to look to "objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." District of Columbia v. Clawans, 300 U.S. at 628. The

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39/ Nev. Rev. Stat. §484.3792(3)(1983)(emphasis supplied).

amendments to the DUI statutes of Nevada restricting judicial and prosecutorial discretion and mandating, inter alia, imprisonment with no probation objectively demonstrate that the people of Nevada consider DUI a serious offense in every instance.

DUI may not always have been considered a serious offense, but it has now become a matter so clearly disfavored in Nevada that the punishment and the collateral consequences of conviction have been repeatedly enlarged. This development in Nevada is further illustrated by the fact that both prosecutors and judges have been legislatively stripped of discretion in the disposition of DUI cases[40] in an effort to ensure that punishment for the

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40/ See Nev. Rev. Stat. § 484.3792(3) (1983).

offense is "certain, severe and swift."41/

The general populace now views DUI as a serious criminal act and greatly

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41/ In an editorial discussing the efforts of a Nevada legislative subcommittee considering amendments to the state's DUI laws, a Reno Gazette-Journal editor wrote:

> [The subcommittee's] members noted that deterrence is best achieved by "certain, severe and swift punishment." They concluded, in language unfortunately too diplomatic, that "the element of certainty of punishment is not fully realized in the judicial process and...swiftness of punishment is sometimes lacking in the court system." ...[T]oday the Legislature has before it a bill that will remove still more discretion from the judges. This bill must be passed, for the protection of every driver in Nevada.

Drunken Driving Bill Would Crack Down on Judges, Reno Gazette-Journal, Feb. 17, 1983, at 21A. See also Kimble, George Ceccarelli On Drunk Drivers: "Let the Sentence Fit the Crime", The Nevada Highway Patrolman, vol. III, no. 1, (Jan. 1983) 48-50, in which Ceccarelli, the Founder of Concerned Citizens and Victims of Drunk-Drivers, discusses her dissatisfaction with judicial and prosecutorial treatment of DUI cases in Nevada.

disapproves of DUI offenders.42/ Like the rest of the country, Nevada has attempted to respond to the public perception that drunk driving is a widespread and serious societal problem.43/ The punishments proscribed by Nevada law leave no doubt as to the legislative judgment about the seriousness of the crime. Increased penalties for drunk driving leave little doubt that driving under the influence is now viewed as a serious problem and as a serious crime.

While the maximum authorized sentence for an offense is clearly relevant to the Court's consideration of the seriousness of

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42/ This disapproval is perhaps not surprising in light of statistics suggesting that nearly half the people in the nation will at some time be involved in an alcohol-related automobile accident. Landry v. Hoepfner, 840 F.2d 1201, 1213 n.25 (5th Cir. 1988).

43/ See generally Legislative Commission of the Legislative Counsel Bureau of the State of Nevada, Driving While Intoxicated, Bull.No.83-7 (1982).

the DUI offense in Nevada, Chief Justice Rehnquist cautioned in Codispoti that the length of sentence test should not be "woodenly" applied. Codispoti, 418 U.S. 525, 536-37. Also, this Court, in Duncan v. Louisiana, held that, "[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial," courts are counseled "to refer to objective criteria, chiefly the existing laws and practices in the Nation." 391 U.S. at 161. Moreover, the Court, in District of Columbia v. Clawans, recognized that standards of action and of policy vary considerably from generation to generation, and that crimes and punishment once thought to be mild may come to be regarded as harsh, calling for a jury trial, even though a jury trial may not have been

provided for prior to the adoption of the Constitution. 300 U.S. at 627. All indicia of an offense recognized as "serious" by this Court are present in the case of DUI in Nevada.

The "wooden[ ]" application of the six month rule has, in at least one case, yielded a result which amici believe is clearly inconsistent with the requirements of the Sixth Amendment. Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987), rev'd en banc, 840 F.2d 1201 (5th Cir. 1988), involved a state statutory scheme which, like the Nevada legislation, imposes serious penalties for a first offense DUI conviction including a mandatory jail sentence, period of community service, and/or participation in a substance abuse treatment program, but nevertheless does not provide for jury trials in such cases.

See 840 F.2d at 1202-04. The Court of Appeals wrote in Landry:

> [I]t is clear that an infraction may be a 'petty offense,' for which the United States Constitution does not require that there be a right of trial by jury, notwithstanding that it is clearly a 'crime' which may be punished by as much as six months' imprisonment.... [A]t least respecting offenses not indictable at common law, when the legislature of a state elects to make criminal certain conduct within that state's borders, it is likewise entitled to determine that the offense it has created shall not be a 'serious' one by fixing 'petty' under the bright-line rule of Baldwin[44/]

Thus, the wooden application of a bright line rule for determining whether an offense is sufficiently serious to require trial by jury led the Fifth Circuit Court of Appeals to permit the state to circumvent the requirements of the Sixth

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44/ 840 F.2d at 1206, 1210 (citation omitted).

Amendment by allowing it to impose "sanction[s which] bear[ ] all the indicia of a [serious] criminal punishment" while denying the right to jury trial merely "by labeling the punishment [and the offense] 'petty.'" Baldwin v. New York, 399 U.S. 66, 76 n.2 (Black, J., concurring). Amici submit that the Landry court erred by mechanistically applying a six-month rule. The majority in Landry simply determined that driving under the influence was not an indictable offense at common law,[45/] and concluded that since the maximum sentence did not exceed six months, the offense

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45/ But see Landry v. Hoepfner, 840 F.2d 1201, 1220 (Garza, J., dissenting)(expressing "amuse-[ment]" with the majority's "conclusion that DWI was never an indictable offense at common law," and noting that "it was not indictable at common law...because the offense did not exist at common law.")(emphasis supplied).

should not be considered a serious one requiring a jury trial.

In addition, the Landry Court attempted an untenable distinction between the situation presented by the Louisiana DWI statute and District of Columbia v. Colts, 282 U.S. 63, which held that a person charged with reckless driving must be provided a jury trial upon demand, although the maximum authorized imprisonment was thirty days. The majority's distinction defies logic. In Nevada and elsewhere, DUI is currently considered a more serious offense than reckless driving.46/ Nevertheless, to reach the conclusion that the reckless driving charge

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46/ See Nev. Rev. Stat. § 484.377; see generally Lehmann, Reckless Driving as Lesser Included Offense of Driving While Intoxicated or Similar Charge, 10 ALR 4th 1252 (noting that many DUI charges were pleaded down to reckless driving in the past).

in Colts was more serious than a modern-day DUI charge, the Landry Court held that the reckless driving in Colts was not just "reckless driving" but "driving so recklessly as to endanger property and individuals." 840 F.2d at 1212. Implicit in this holding is the conclusion that drunk driving is not "driving so recklessly as to endanger property and individuals." This conclusion is simply untenable. Nevertheless, the end result of Landry is that a person accused of reckless driving is entitled to a jury trial,47/ but a person accused of DUI is not similarly afforded a jury trial upon request in Nevada. This result is clearly incongruous and contrary to public policy and, for the reasons set

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47/ See Colts, supra.

forth supra, should be rejected by this Court.

Nevada's statutory scheme imposes additional serious collateral consequences for a conviction of driving under the influence. The offender faces automatic driver's license revocation. Nev. Rev. Stat. § 484.384. As noted by the court in Bronson v. Swinney, in Nevada, where distances are great, the revocation of a driver's license is a serious matter. "Driving is nearly imperative to the ability of many people to earn a living." 648 F.Supp. at 1099. Another major consequence is that the penalties provided in the statute compound so that the third conviction within a seven year period carries a mandatory penalty of imprisonment in the state prison for not less than one year nor more than six years, and a fine of

not less than $1,000 nor more than $5,000. Nev. Rev. Stat. § 484.3792. Additionally, the names of DUI offenders in Nevada are regularly published in the newspapers, thereby exposing DUI offenders to even greater stigma. 648 F.Supp. at 1099-100. Obviously a first or second DUI conviction will have greater collateral consequences than a first or second conviction for most misdemeanors.

In light of the threat of mandatory jail time without the possibility of probation, automatic driver's license revocation, escalation of penalties faced for subsequent DUI offenses, public opprobrium and the serious economic repercussions affecting the average individual charged with a DUI, the offense must be considered serious.

Driving while intoxicated is a deadly crime. The people of

> the State of Nevada, through their legislature and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime.

Bronson v. Swinney, 648 F.Supp. at 1100. In Nevada, DUI is clearly a serious criminal offense and thus, petitioners should have been afforded an opportunity for jury trial on the charges against them.

B. Petitioners' Interests Are Disserved By The State Of Nevada's Statutory Preclusion Of Jury Trials For Individuals Accused Of DUI, And There Are No State Interests Of Constitutional Magnitude Served By The Deprivations Of The Jury Trial Right Which Occurred In This Case.

The Court below held, inter alia, that

> [A] non-jury trial, in a misdemeanor case, is speedy and inexpensive. On the other hand, a decision of this court requiring jury trials in the prosecution of DUI offenses in the municipal court would result in tremendous expense to the municipalities of this state.... [S]erious financial, administrative, and policy

> concerns [would arise if t]he position of the federal district court in Bronson ... were ... to be adopted by this court....

Blanton v. North Las Vegas, 748 P.2d 494, 501-02 (Nev. 1987). This conclusion is troubling for a number of reasons.

Amici note, at the outset, that administrative burdens alone cannot justify the denial of a fundamental constitutional right. As discussed fully supra, the decisions suggest that the right to jury trial for an individual accused of DUI in Nevada is such a right. However, assuming arguendo that the court below has properly identified state interests which must be balanced against the petitioners' constitutional interests, it is appropriate to consider whether the government's interests here outweigh the interests served by pro-

viding DUI defendants the option to request trials by jury.[48]

This Court has identified "the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and ... the community participation and shared responsibility that results from that group's determination of guilt and innocence" as the "essential feature[s] of a jury." Williams v. Florida, 399 U.S. 78, 100 (1970). These "feature[s] of a jury" are among the interests which would be served by affording petitioners the opportunity for jury trial. One federal judge, evaluating

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48/ "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard .... [b]ut the government's interest ... in conserving scarce fiscal and administrative resources, is a factor that must be weighed." Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

his experience with jurisdictions that only provide bench trials for persons accused of DUI, has written:

> [I]n many ... jurisdictions, DWI cases are handled as if in a mass production line.... An offender who believes that he was unlawfully charged with driving while intoxicated would have the protection of ... having his case tried by a jury [if the appropriate assessment of the seriousness of the DUI offense were made].[49]

While the judges in a jurisdiction which requires bench trials in all DUI cases may not intend to deliver "mass production" justice, the Nevada experience to date suggests that it may prove difficult to avoid this result where "everyone in the court is loaded with work," and "keep[ing] up with the added DUI cases...[requires

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49/ Landry v. Hoepfner, 840 F.2d 1201, 1220 (5th Cir. 1988) (Garza, J., dissenting).

conducting] an average of two trials ... every day."50/

An additional pressure evidently exerted upon Nevada's judges in DUI cases is the perception that "the state's courts [a]re being too lenient on drunken drivers."51/ This perception is sufficiently widespread to have prompted amendment of the state's DUI laws to "remove...discretion from the judges."52/ Where, as here, judicial as well as prosecutorial discretion is severely curtailed by statute, the accused might opt for a jury trial because he believes that the jury "represents an impressive way of

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50/ Phillis, Officials Fear Tougher Laws Losing Punch, Reno Gazette-Journal, April 18, 1988 at 2C.

51/ Editorial, Drunken Driving Bill Would Crack Down On Judges, Reno Gazzette-Journal, Feb. 17, 1983, at 21A.

52/ Id.

building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it."53/ Judges administering DUI laws have also been subjected to monitoring by groups such as Mothers Against Drunk Driving54/ and Concerned Citizens and Victims of Drunk Drivers.55/ One exhibit to the record of the Nevada Legislature's 1983 joint hearing on the DUI laws warned that "judges ... had best start watching those court-watchers appearing more and more regularly in their courtrooms to

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53/ Kalven & Zeisel, supra, note 10 at 498.

54/ See, Exh. D. to the Minutes of the Nevada State Legislature Joint Hearing on Drunk Driving (Feb. 17, 1983). at 65-66.

55/ See Kimble, supra note 40 at 49.

observe drunk driving proceedings. They're MADD [Mothers Against Drunk Driving] ladies, and they're starting to keep tabs. The results could be embarrassing come next election."[56/] This is not an idle threat since judges at all levels of the Nevada judiciary are popularly elected.[57/] In Nevada Highway Patrolman, the founder of Concerned Citizens and Victims of Drunk Drivers, said that on one occasion her court monitoring led the judge to deny a motion for reduction of bail in a DUI case.[58/] Under the circumstances, a defendant's interest in the jury trial

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56/ See supra note 53.

57/ See Nev. Const., Art. VI, §§ 3 and 5.

58/ Kimble, supra, note 40 at 49. Later in the interview CCVD founder George Ceccarelli discusses a case where a DUI defendant received an "unusual[ly]" harsh sentence. After the sentencing she introduced herself to the defendant's lawyer and, according to Ceccarelli, he replied, "Oh, now I know why he got such a stiff sentence.'" Id.

right is substantial, and preservation of that right is particularly important here "to protect against ... judges too responsive to the voice of higher authority," and to provide a necessary "safeguard against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. at 156.

Due to the pressure brought to bear on prosecutors and judges by outraged citizen groups against drunk driving,[59/] there is a real danger of assembly line

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59/ One Nevada newspaper compared the legislative debate of the DUI legislation in 1983 to a "binge" in which "raucous witnesses ... shouted their desire to somehow legislate revenge for relatives killed in highway wrecks ... [and l]awmakers ... joined in by proposing ways the laws might be made more harsh to deliver vengeance." The editorial concluded by urging a return to "sober reflection on .. what ... the legislature might do to effectively and reasonably address the problem of highway traffic deaths." Time To Sober Up About Drink Driving Penalties, Elko Daily Free Press, Apr. 11, 1983.

justice being meted out by overzealous prosecutors and judges when jury trials are not allowed. The very purpose of the Sixth Amendment is to protect citizens in serious criminal cases against arbitrary and oppressive law enforcement. The DUI defendant in Nevada is charged with a serious crime in all respects and should be guaranteed a jury trial to prevent such arbitrariness and oppression.

While the decision below cited the "tremendous expense" which would result from the application of the Sixth Amendment jury trial right in the cases of DUI defendants, this Court noted, in Baldwin v. New York, that "[e]xperience in other States ... where jury trials are available for all criminal offenses including traffic violations ... suggests that the administrative burden is likely to

be slight, with a very high waiver rate of jury trials." 399 U.S. at 74 n.22.60/ Although comprehensive information is unavailable at this time, statistics furnished by the Justice Court of Nevada's second largest city support this Court's assertion in Baldwin that the additional administrative burdens imposed upon the state will not be great.

In 1986, the Reno Justice Court began to allow jury trials upon request by individuals charged with DUI. In 1986, all 707 individuals charged with DUI were informed that they could elect a jury trial; only 111 requested a jury trial, and only one jury trial was conducted in 1986, at a total cost of $284.70. In 1987, of 897 individuals charged with DUI, only 126

60/ Accord Kalven & Zeisel, supra note 10 at 24-31.

requested a jury trial, and twelve trials were conducted, at a total cost of $4,961.36.[61] Although this information is limited, it clearly contradicts the conclusion that "[t]he resulting expense to the municipality ... [is substantial enough to] deter the prosecution of DUI offenses." Blanton, 784 P.2d 484, 501.

Finally, it is significant that a majority of the states have been able to extend to DUI defendants the very protection the state seeks to deny here without experiencing the calamitous results predicted in the decision below.[62]

61/ Unpublished Reports of the Reno, Nevada Justice Court Statistics. (December 31, 1986 and December 31, 1987). (Furnished by Carolyn Higgins, Chief Criminal Clerk of the Reno, Nevada Justice Court).

62/ There is some disagreement about the precise number and circumstances of the states providing DUI defendants with jury trials upon demand, compare Landry v. Hoepfner, 818 F.2d 1169, 1174 n.2 (continued...)

When one weighs the importance of the liberty interests implicated by DUI conviction against the administrative and fiscal burdens of the additional due process protection being requested, it is apparent that a DUI defendant in Nevada should be entitled to a jury trial upon demand.

62/ (...continued)
(5th Cir. 10987) (noting that "only six states deny defendants the right to trial by jury on DWI charges") with Landry, id. at 1185-86 (Garwood, J., dissenting) (disagreeing with majority's statistics, and suggesting that "about a fourth or a fifth of the states ... do not authorize a jury for DWI"). By even the most conservative estimates, a majority of states allow jury trial of persons charged with DUI.

CONCLUSION

For the reasons set forth above, amici respectfully urge this Court to reverse the decision below.

Respectfully submitted,

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No. 87-1437

In The
Supreme Court of the United States
October Term, 1988

MELVIN R. BLANTON and MARK D. FRALEY,
Petitioners,

v.

CITY OF NORTH LAS VEGAS, NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE CITY OF LAS VEGAS, NEVADA, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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No. 87-1437

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v.

CITY OF NORTH LAS VEGAS, NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE CITY OF LAS VEGAS, NEVADA, AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

The City of Las Vegas, Nevada, as *amicus curiae* (Amicus) pursuant to Supreme Court Rule 36.4, urges this Court to affirm the judgment of the Nevada Supreme Court in *Blanton v. North Las Vegas Municipal Court,* 103 Nev. Adv. Op. 135, 748 P.2d 494 (December 31, 1987).

INTEREST OF AMICUS CURIAE

Amicus and the City of *North* Las Vegas, Nevada, are two separate and autonomous, but contiguous, municipal corporations located in Clark County, Nevada.

As to this appeal, eleven cases involving the charge of driving under the influence (DUI) of intoxicating substances came before the municipal courts of the two municipalities. Nine of the cases originated in Amicus' municipal court and two originated in the North Las Vegas Municipal Court.

Following certain municipal court proceedings, all of the cases were appealed to the "county-wide" district court of Clark County. Following district court proceedings, all eleven cases were appealed—some by the municipalities, some by the individual parties—to the Nevada Supreme Court. *Blanton v. North Las Vegas Municipal Court, supra,* was the case into which the Nevada Supreme Court consolidated all of the cases for review.

None of the nine cases in which Amicus was a party is on review in this appeal. The two in which the City of North Las Vegas was a party, those of Melvin R. Blanton and Mark D. Fraley, are on review.

Because the question of a right to jury trials for first-time DUI offenses, petty offenses in Nevada, was common to all eleven of the cases and because of the impact this Court's decision will have on Amicus' municipal judicial machinery, Amicus maintains it is vitally interested in this appeal.

SUMMARY OF ARGUMENT

Amicus, in its introductory comments, takes the (perhaps unpopular) position that demands for jury trials in first-time DUI offenses have finally begun to adversely affect, as defendants, the lives of middle and upper-middle class persons.

Years ago, when DUI was not regarded as, or at least not judicially treated as, a "significant" offense, not much widespread community concern about it existed. In time, with a more vigorous enforcement of traffic laws and increased penalties for DUI nationwide, persons other than the "noisy and unruly" were arrested. It was only then, in some jurisdictions, that middle and upper-middle class defendants realized they had no right to a jury trial because it was considered a petty offense. Then the demands for jury trials began.

In 1985, through what was an attempt to eliminate so-called duplicative statutes in Nevada, certain laws relating to municipalities were repealed. The title of the legislative enactment is: "AN ACT relating to municipal courts; eliminating *duplicative* statutes; consolidating related provisions; and providing other matters properly relating thereto." (Emphasis supplied.)

Among the repealed laws was a provision that prohibited jury trials for petty offenses in specially chartered municipalities, including Amicus and the City of North Las Vegas. That same provision was not repealed in a handful of municipalities that were not specially chartered. The effect has been an incongruity that could suggest to the careful observer that, while jury trials for misdemean-

ors are prohibited in some municipalities, they may be permissible in others. Amicus suggests this anomoly was the result of legislative oversight. The true intent of the Nevada legislature is to prohibit jury trials in misdemeanor cases.

The gravity of the offense of DUI is measured by the punishment that may be imposed. This Court has held in case after case that an offense punishable by not more than six months' incarceration is a petty offense. Although most states provide jury trials for *all* misdemeanors, including first-time DUI offenses, Nevada does not. Hence, in Nevada and a minority of other states, persons who are convicted of having committed petty offenses, including the offense of DUI on the first occasion, are subject to punishment of not more than six months' incarceration and a fine of $1,000.00. As a result, Nevada's treatment of such offenses is not violative of this Court's rulings. Nevada's legislative determination and judicial disposition of first-offense DUI cases fall within the proper classification and the realm of permissible adjudication of DUI offenses without jury trials.

The Nevada Supreme Court, in deciding that jury trials are not required in DUI cases on the first occasion, expressly declined to follow a federal decision originating in Nevada and in so doing was not acting judicially inappropriately.

Although many states limit the maximum fine for petty offenses to $500.00, this figure is not axiomatically the limit, and otherwise petty offenses (i.e., incarcerable by not more than six months) are not deemed serious because of the potential of a higher fine.

ARGUMENT

I

Introduction and a Differing Point of View

Throughout this argument reference to a jury trial for DUI means a jury trial for a first-time DUI offense, a petty offense in Nevada.

Prior to the commencement of the somewhat recent groundswell of national outrage about drunk driving, DUI was likely not much of a concern to the citizen untouched personally by the ravages of the offense. To most persons, drunk driving was something that "noisy and unruly" individuals indulged in.

As to the noisy and unruly, the consensus seemed to hold that there were no reputations to be tarnished or community standing to be damaged. There were no careers to be ruined or little league teams to flounder because "Coach" was in jail. Often there were no insurance policies to be canceled, let alone premiums to be increased. And often as well there may not have been any serious economic repercussions for there may not have been any salaries to be lost or jobs to be terminated. Public opprobrium was virtually nonexistent. Furthermore, *e.g.*, fifteen years ago, DUI not involving property damage or personal injury was generally dealt with, if not by the proverbial slap on the wrist, certainly less severely than it is in the current decade.

Drinking and driving represents conduct that knows no social bounds. (Perhaps it never did; but if so, that fact was "discovered" only after the lense of public concern was more sharply focused on persons charged with

DUI and the disposition of their cases.) It is indulged in by the rich and the poor; the famous and the infamous; the celebrated and the notorious; the tall and the short; the handsome and the homely, the fat and the lean; the young and the old; male and female; white and black; and, indeed, the noisy and unruly.

As motorists, DUI is probably the single most likely criminal offense with which otherwise law-abiding citizens might be charged and to which they might succumb. As a result, DUI appears to be the one misdeamanor offense about which the demand for jury trials is sounded most loudly.

In the several cases cited in this brief that discuss DUI and jury trials as well as those cases cited by the parties throughout the history of this case and in the opinion of the Supreme Court of Nevada, there is virtually no mention of why there is, all of a sudden, a demand for jury trials. (Part of the reason, of course, is that most states either by statute or by state constitution allow jury trials for DUI and other petty offenses.) *Bronson v. Swinney*, 648 F.Supp. 1094 (D.Nev. 1986), comes closest when discussing the "collateral consequences doctrine." Still that decision does not mention what Amicus believes is the most significant reason: DUI has become a middle and upper-middle class problem.

Consider the following scenario: "Mr. Driver" is a well-positioned, law-abiding citizen. He is an educated, married breadwinner and father. He holds a secure and responsible job. He has standing in his community, in his church, and in his local charitable or civic organization.

He has never been concerned about "jury rights." He has never had a need to be; he has never been arrested.

Then one night while driving home after an office party, "Mr. Driver" is stopped for weaving and is subjected to the glare of the constable's flashlight. He slurringly explains his activities of the past few hours. He is arrested and charged with DUI. Only later does he learn there is no jury to whom he can plead, "But for the Grace of God, here you stand."

Some may disagree with the foregoing analysis, which is perhaps a differing point of view. But if so, why then is there rising from the ashes of discontent a phoenix of "collateral consequences" in DUI cases which this Court is now being urged to consider in determining the difference between petty and serious criminal offenses? The possibility of license revocation, insurance cancellation, public opprobrium, the loss of employment, and financial ruin have reached out and touched those least able to endure the effects—the respectable.

Rhetorically, why is there not as much concern about the "collateral consequences" that bear upon the lives of persons who are, without benefit of jury, incarcerated for up to a maximum of six months for offenses other than DUI—"messier" offenses not committed by the respectable? Surely one is as likely to suffer several of the same types of social disdain that is implicit in the "collateral consequences" of DUI. Amicus believes the reason is in part because the "Mr. Drivers" of the nation do not become involved with "messier" offenses as do those noisy and unruly persons for whom not even the concern for

primary consequences, let alone consequential consequences, is felt by the public.

Be that as it may, what is being urged in this appeal is an elimination of the one azimuth wisely triangulated and clearly drawn upon which courts may rely to guide themselves in determining, by constitutional standards, when a jury trial is required on the petty/serious landscape of criminal conduct. Amicus does not believe it is necessary to survey the same terrain again.

The Issues

I

The Nevada State Legislature Did Not Actually Intend to Repeal the Statutory Provision (NRS 266.550) Prohibiting Jury Trials in Certain of Nevada's Municipal Courts.

NRS 266.005 provides:

> The provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter enacted or granted pursuant to the provisions of section 1 of article VIII of the constitution of the State of Nevada.

NRS 266.550 provides:

> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justices' courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature; *but the trial and proceedings in such cases shall be summary and without a jury.* (Emphasis added.)

Amicus, as well as twelve other municipalities in Nevada, derives its existence from a special charter. Originally, as to municipal courts, the provisions of chapter 266 of NRS as written did not apply to Amicus. However, Amicus' special charter provided that as to its municipal courts chapter 266 *did* apply to it.

In 1985, in what was intended as a removal of certain so-called duplicative statutes ("AN ACT relating to municipal courts; eliminating *duplicative* statutes; consolidating related provisions; and providing other matters properly relating thereto." (Emphasis supplied.)) (*See* App. "A", the Nevada State Legislature repealed from the thirteen special charters those provisions incorporating chapter 266 of NRS. In so doing, the Legislature inadvertantly ignored the fact that, by virtue of NRS 266.005, those provisions, and, specifically, the prohibition against jury trials in municipal courts, were not "duplicated" elsewhere in the special charters or in the Nevada Revised Statutes.

As a result, the Legislature created an anomoly in the municipal court system in Nevada. On the one hand, the Legislature stripped the municipal courts of the thirteen specially chartered municipalities of certain power, but on the other hand left that power intact as to municipalities not created by special charter. (As to Amicus, *see*, 1985 Nev. Stats. ch. 208, Sec. 12, App. "B".)

As to specially chartered municipalities, the only statute that now refers to the jurisdiction of municipal courts is NRS 5.050, (*See* App. "C") which is silent in respect to jury trials. As to nonchartered municipalities, the provisions of NRS 266.550 remain in effect. The nonchartered municipalities are Ely, Fallon, Lovelock, (Mesquite), and Winnemucca (*See Blanton, supra,* at 497, n. 5), and jury

trials in municipal courts in those municipalities are prohibited. Therefore, it is reasonable to assume and equally reasonable to infer and conclude that the legislature did *not* intend to remove the prohibition against jury trials from municipalities. Through oversight, therefore, an attempt to remove so-called duplicative statutes resulted in neutering the municipal courts that derive their existence from special charters.

It is submitted that while the Legislature intended to eliminate *duplicative* statutes, it did not actually do so as to NRS 266.550 because no duplication of it existed; certainly not as to Amicus. Among other things, the Legislature removed from thirteen municipal courts the prohibition against jury trials, but as to certain other municipalities, left it in. The apparently incongruous consequence of what has happened is that in certain municipalities in Nevada a person charged with DUI might be eligible for a jury trial while in others that same person may not have a jury trial.

For example, in traversing the state along Interstate 80 from the Utah border to the California border, "Mr. Driver," if he were arrested for DUI in Wells, Elko or Carlin, would be entitled to a jury trial; while in Winnemuca or Lovelock, he would not be entitled to a jury trial; and in Sparks or Reno he would be entitled to a jury trial if 1985 Nev. Stats. ch. 208 were interpreted literally. Certainly this could not be the result that was intended by the Legislature.

Therefore, it is respectfully submitted that the legislative intent and the law of the State of Nevada continue to deny jury trials in municipal courts, even those in municipalities in which the prohibition against jury trials has, on the surface, been eliminated.

II

There is No Right to a Jury Trial for a Misdemeanor DUI Offense in Nevada Where the Maximum Authorized Penalty is a Jail Term of Six Months and a Fine of One Thousand Dollars.

Amicus, for the sake of brevity will forego extensive reference and quotations in the "petty/serious offense dichotomy" in deference to the Court's knowledge its own decisions and with the assumption that the same decisions will be referred to extensively by the parties to this appeal. Amicus recognizes that synopses of decisions may appear to omit much, depending on one's point of view, and does not want this appearance to minimize the seriousness with which Amicus views this task. However, this approach is being undertaken in the interest of appellate economy.

One hundred years ago this Court, in *Callan v. Wilson*, 127 U.S. 540 (1888), decided that the language of the United States Constitution was to be construed in light of the period of time in which it was written. Therefore, this Court held that the right to a jury trial was not intended to apply to crimes which were petty offenses at common law.

This Court has followed this distinction in many cases since *Callan*. *Natal v. Louisiana*, 139 U.S. 621 (1891); *Schick v. United States*, 195 U.S. 65 (1904); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966).

Of more recent date, several significant cases have embraced the common law criterion.

Duncan v. Louisiana, 391 U.S. 145 (1968), decided that the Sixth Amendment to the United States Consti-

tution applied to the states by virtue of the Fourteenth Amendment. Duncan was charged in state court with simple battery. The maximum penalty consisted of a fine of not more than $300.00 or incarceration for not more than two years. A crime punishable by incarceration for up to six months does not require a jury trial; but one carrying possible incarceration of up to two years was serious and hence a jury trial was required. The Court looked at what punishment could be imposed, not at what was imposed.

This "possible sentence" concept was carried forward in *Frank v. United States*, 395 U.S. 147 (1969), which was a criminal contempt case. This Court held that the Sixth Amendment to the United States Constitution gives defendants a right to a jury trial in all criminal cases, that criminal contempt was to be treated like all other criminal offenses, and that a defendant would be entitled to a jury trial unless the offense were classified as petty. The Court looked to *District of Columbia v. Clawans, supra*, in determining whether a crime was serious or petty. The Court held that that determination was to be based on the seriousness of the authorized penalty. Maximum penalties of not more than six months' incarceration were considered petty, and petty offenses need not be tried by a jury.

In *Baldwin v. New York*, 399 U.S. 66 (1970), the defendant was charged with a New York City misdemeanor called "jostling," the maximum term of imprisonment for which was one year. By statute, however, he was not entitled to a jury trial. Again this Court held that serious crimes require a trial by jury; petty offenses do not. Petty offenses were those for which possible incarceration was

not more than six months, and serious offenses were those with a possible sentence of more than six months. The potential penalty for the offense was taken to be the only objective criterion by which to judge its gravity.

Codispoti v. Pennsylvania, 418 U.S. 506 (1974), is a case in which punishment for contempt in a state court proceeding was at issue. Two defendants were sentenced to aggregate consecutive terms of eleven to twenty-two years and six to twelve years respectively. Although no single contempt charge was punished by more than six months' incarceration, the defendants were entitled to a jury trial nonetheless because theirs were serious offenses involving incarceration for a total of more than six months.

Two recent conflicting but significant lower court decisions provide contemporary points of view of the "petty/serious" DUI dichotomy. They are *Bronson v. Swinney, supra*, and *Landry v. Hoepfner*, 840 F.2d 1201 (5th Cir. 1987).

The federal district court in *Bronson v. Swinney, supra*, in referring to the Nevada Supreme Court's opinion in *State v. Smith*, 99 Nev. 806, 672 P.2d 631 (1983), which interpreted the six-month, thousand-dollar threshold as proper for jury trials in Nevada, criticized the opinion as "too restrictive." This Court is urged to consider that in *State v. Smith, supra*, the Nevada Supreme Court relied upon the criterion of the maximum possible penalty in its characterization of DUI as a petty offense.

> . . . [W]e look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is petty and the right to

trial by jury does not attach. [Since] NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury. *Smith, supra,* at 810, 672 P.2d at 634.

The federal district court in *Bronson v. Swinney, supra,* in its criticism considered the "collateral consequences doctrine" as the more reasonable standard by which to determine the seriousness of an offense, notwithstanding its concession that the maximum authorized penalty was the most important criterion by which to do so.

In support of its "collateral consequences doctrine," the federal district court in *Bronson v. Swinney, supra,* quotes *United States v. Craner,* 652 F.2d 23 (9th Cir. 1981).

> "Although Congress has established the sanctions of six months' imprisonment or $500 in fines as the bright line between serious and petty offenses, *see* 18 U.S.C. [Sec.] 1(3), the Supreme Court has not found 'talismanic significance' in this formula when determining whether a constitutional right to a jury trial exists." (Quotation marks, *sic.*)

Although the six-month threshold is not talismanic, neither is the loss of a driver's license, the cancellation of automobile insurance, the likely loss of a job (even if incarceration is as "little" as 30, 60, or 90 days), or public opprobrium. True, these factors are not to be viewed lightly, for hardly any "Mr. Driver" short on Spartan vigor could withstand the full impact of any one let alone all of these consequences. But that unfortunately is beside the point.

An opposite conclusion was reached by the United States Court of Appeals, Fifth Circuit, in affirming *Landry v. Hoepfner,* 840 F.2d 1169 (5th Cir. 1987), which was similar to the instant case in that defendant Landry wanted a jury trial for a first-time DUI offense in which the maximum authorized penalty was a fine of $500.00 and a sentence of six months incarceration.

After discussing, *Duncan, Frank, Baldwin,* and *Codispoti* the court of appeals in referring to this Court said at 1209, ". . . [this] Court has *never* held or stated any crime is a 'serious' rather than a 'petty' offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law." (Emphasis in original.)

Later, at 1216, in discussing the "collateral consequences" of a conviction for DUI, although that term was not specifically used, the court of appeals said, "We know of no basis or standard by which *we* can say that such repercussions and opprobium [*sic*] resulting from a [DUI] conviction are as a matter of law different *in kind* from those resulting from confinement for conviction of numerous other concededly petty offenses, such as public drunkenness." (Emphasis in original.)

This Court in *Baldwin v. New York, supra,* set forth the criterion by which petty and serious misdemeanants shall be judged. The issue is simple: If the possibility of incarceration is not more than six months, a defendant is not entitled to a jury trial; if the possible period of incarceration exceeds six months, a jury trial is required. The unavailability of jury trials in Nevada for first-time DUI offenders is within the guidelines laid down by this Court. The issue becomes awkward only when it is "decorated" with the ornaments of "collateral consequences."

Finally, in certain opinions and briefs connected with this case, there have appeared recitations of statistics concerning the number of jurisdictions that allow DUI jury trials and those that do not (*e.g.*, cf. Petitioners' brief, Appendix "A"). However, this apparent "weight" of authority results not from the fact that those jurisdictions regard DUI as a special ("serious") type of misdemeanor but from the fact that, in those jurisdictions, all misdemeanants are afforded jury trials. The weight of numbers does not tip the balance as persuasively as the weight of reason, deliberation and precedent.

In this respect the Court's attention is invited to *Martin v. Ohio,* 480 U.S. — (1987). In that case, a woman shot and killed her husband and claimed self defense. In Ohio a defendant has the burden of proving self defense. In addressing the issue of "majority practice," the Court said,

> . . . [W]ell into this century, a number of States followed the common law rule and required a defendant to shoulder the burden of proving that he acted in self-defense. (Citation omitted.) We are aware that all but two of the States, Ohio and South Carolina, have abandoned the common law rule and require the prosecution to prove the absence of self-defense when it is properly raised by the defendant. But the question remains whether those States are in violation of the Constitution; and, as we observed in Patterson, that question is not answered by cataloging the practices of other states. We are no more convinced that the Ohio practice of requiring self-defense to be proved by the defendant is unconstitutional than we are that the Constitution requires the prosecution to prove the sanity of a defendant who pleads not guilty by reason of insanity.

III

A Fine Which Exceeds the $500.00 Threshold Does Not Make an Otherwise Petty Offense Serious.

Although "a sentence and a fine" have always been considered together in addressing the "petty/serious offense dichotomy," the severity of a potential fine has not figured as significantly in the Court's decisions as has the length of the permissible sentence.

Amicus does not wish to add weight to this question and merely invites the Court's attention to its decision in *Muniz v. Hoffman,* 422 U.S. 454 (1975), and to 18 USC Sec. 1(3) which was amended by Congress in 1984 by increasing the fine for petty offenses to $5,000.00 from $500.00.

IV

The Supreme Court of the State of Nevada Acted Properly in Refusing to Follow a Federal District Court's Ruling.

Amicus believes the position the Nevada Supreme Court took *Blanton v. North Las Vegas Municipal Court, supra,* in not following *Bronson v. Swinney, supra,* is correct.

This is not a new or novel attitude in Nevada. "We are bound by the decisions of the United States Supreme Court (Nevada Constitution, Article I, Sec. 2.). We are not bound by the decisions of the other federal courts." *Bargas v. Warden,* 87 Nev. 30, 32; 482 P.2d 317 (1971).

Nor is it an attitude unique to Nevada. *See People v. Luros,* 480 P.2d 633, 92 Cal Rptr. 833 (1971). (Federal courts are not "compelling authority" as to state action.);

State v. Harmon, 107 Idaho 73, 685 P.2d 814 (1984). (Idaho might defer to federal district court decisions, but it was not bound by them.)

On the other hand, Nevada is not intransigent in its attitude. *See Rahn v. Warden*, 88 Nev. 429, 498 P.2d 1344 (1972) in which the Nevada Supreme Court acquiesced in decisions of the Ninth Circuit Court of Appeals.

It is respectfully submitted the Nevada Supreme Court is not bound by, and need not blindly follow, the federal district court. In *Blanton v. North Las Vegas Municipal Court, supra*, it chose not to, and that decision for the reasons set forth by that court it is submitted is one to be respected by this Court.

CONCLUSION

For the reasons set forth above, Amicus respectfully prays that this Court concur with the decision of the Nevada Supreme Court in denying jury trials to first-time DUI offenders in the State of Nevada.

Respectfully submitted,

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APPENDIX "A"

Assembly Bill No. 202—Committee on Judiciary

CHAPTER 208

AN ACT relating to municipal courts; eliminating duplicative statutes; consolidating related provisions; and providing other matters properly relating thereto.

[Approved May 17, 1985]

THE PEOPLE OF THE STATE OF NEVADA, REPRESENTED IN SENATE AND ASSEMBLY DO ENACT AS FOLLOWS:

Section 1. NRS 5.010 as hereby amended to read as follows:

5.010 [A] *There must be in each city a municipal court presided over by a municipal judge.* The municipal court must be held [by a judge who is designated as municipal judge, and the court must be held] at such place in the city within which it is established as the governing body of that city may by ordinance direct.

Sec. 2. NRS 5.020 is hereby amended to read as follows:

5.020 1. Except as provided in subsection 2, each municipal judge must be chosen by the electors of the city within which the municipal court is established on a day to be fixed by the governing body of that city. He shall hold his office for 1 year, unless a longer period is fixed by the charter of the city, in which case he shall hold his office for that longer period. Before entering upon • • •

APPENDIX "B"

Sec. 12. Section 4.010 of the charter of the City of Las Vegas, being chapter 517, Statutes of Nevada 1983, at page 1412, is hereby amended to read as follows:

Sec. 4.010 Municipal court.

1. There is a municipal court of the city which consists of at least two departments. [,each of which must be presided over by a municipal judge and has such power and jurisdiction as is prescribed in, and is, in all respects which are not inconsistent with this charter, governed by, chapters 5 and 266 of NRS which relate to municipal courts.]

2. The city council may from time to time establish additional departments of the municipal court and shall appoint an additional municipal judge for each.

3. At the first general election which follows the appointment of an additional municipal judge to a newly created department of the municipal court, the successor to that municipal judge must be elected for a term of 2 or 4 years, as determined by the city council, in order to effectuate the intent of this provision that, as nearly as practicable, one-half of the number of municipal judges be elected every 2 years.

4. The respective departments of the municipal court must be numbered 1 through the appropriate arabic number, as additional departments are approved by the city council. A municipal judge must be elected for each department by number.

APPENDIX "C"

5.050 Jurisdiction.

1. Municipal courts have jurisdiction of civil actions or proceedings:

(a) For the violation of any ordinance of their respective cities.

(b) To prevent or abate a nuisance within the limits of their respective cities.

2. The municipal courts have jurisdiction of all misdemeanors committed in violation of the ordinances of their respective cities.

3. The municipal courts have jurisdiction of:

(a) Any action for the collection of taxes or assessments levied for city purposes, when the principal sum thereof does not exceed $2,500.

(b) Actions to foreclose liens in the name of the city for the nonpayment of those taxes or assessments when the principal sum claimed does not exceed $2,500.

(c) Actions for the breach of any bond given by any officer or person to or for the use or benefit of the city, and of any action for damages to which the city is a party, and upon all forfeited recognizances given to or for the use or benefit of the city, and upon all bonds given on appeals from the municipal court in any of the cases named in this section, when the principal sum claimed does not exceed $2,500.

(d) Actions for the recovery of personal property belonging to the city, when the value thereof does not exceed $2,500.

(e) Actions by the city for the collection of any damages, debts or other obligations when the amount claimed, exclusive of costs or attorney's fees, or both if allowed, does not exceed $2,500.

4. Nothing contained in subsection 3 gives the municipal court jurisdiction to determine any such cause when it appears by the pleadings of the verified answer that the validity of any tax, assessment or levy, or title to real property, is necessarily an issue in the cause, in which case the court shall certify the cause to the district court in like manner and with the same effect as provided by law for certification of causes by justices' courts.

[33:19:1865; B § 938; BH § 2452; C § 2533; RL § 4853; NCL § 8395] + [34:19:1865; B § 939; BH § 2453; C § 2534; RL § 4854; NCL § 8396]—(NRS A 1959, 853; 1981, 652, 1928; 1985, 129, 671)

Supreme Court, U.S.
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No. 87-1437

In the
Supreme Court of the United States

October Term, 1988

Blanton

versus

North Las Vegas

ON WRIT OF CERTIORARI TO THE
NEVADA SUPREME COURT

BRIEF FOR THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION AS AMICUS CURIAE SUPPORTING RESPONDENTS

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September, 1988

QUESTIONS PRESENTED

The Louisiana District Attorney's Association will address the following question:

Whether the misdemeanor offense of driving under the influence of intoxicating liquor under state and federal constitutional law is a "serious" crime to which right to jury trial applies.

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INTEREST OF THE LOUISIANA DISTRICT ATTORNEYS ASSOCIATION

In Louisiana, driving while intoxicated is a misdemeanor that carries a maximum penalty of six months and/or up to a $500 fine. Under state law a DWI defendant is not entitled to a jury trial. Since the Louisiana judicial system statewide schedules DWI trials as non-jury trials and our more populated jurisdictions assign DWI trials to courts without jurisdiction over a jury trial, Louisiana has a substantial interest in the determination of whether or not a DUI is a "serious crime", notwithstanding its maximum penalties, such that a defendant is entitled to a jury trial. This Court's resolution of the issue could affect Louisiana's statutory scheme and create a substantial economic burden on the state and local governments if jury trials were required in DWI cases.

STATEMENT

The Supreme Court of Nevada consolidated several cases to consider whether or not DUI defendants were entitled to jury trials under the Nevada and United States Constitutions. *Blanton v. North Las Vegas Municipal Court,* 748 P.2d 494 (1987). After establishing that the right to a trial by jury under the Nevada Constitution was coextensive with that guaranteed by the Federal Constitution, the Supreme Court of Nevada concluded that the federal constitution does not require a right to a jury trial in misdemeanor cases where the maximum penalty is (6) months imprisonment and/or $1,000.00 fine. Further, it concluded that the decisions of the United States Court of Appeals for the Ninth Circuit which declared DUI a "serious " crime to which a right to a jury trial attaches are not binding upon the Nevada courts. The Nevada Supreme Court's opinion is now before this Honorable Court for review of the "serious" nature of a misdemeanor DUI such that a right to a jury trial attaches.

SUMMARY OF ARGUMENT

The states of Louisiana and Nevada have classified certain grades of DWI as offenses not warranting a trial by jury. Generally, the classification of state criminal offenses is largely a state matter provided that such does not violate clear federal constitutional requirements. The United States Supreme Court in a series of cases has established that crimes which carry possible penalties of up to six (6) months do not require a jury trial if they otherwise qualify as "petty" offenses but the penalty authorized for a particular crime is a major relevance in determining whether is it serious or not.

In decisions, below, the Fifth Circuit of the United States and the Supreme Court of the State of Nevada, while disagreeing on the exact meaning of various cases, trace the jurisprudential history of the right to a trial by jury. Although

these courts do not agree on reasoning, they concur in the final result: unless the penalty for DWI exceeds possible incarceration for six months, the right to a trial by jury for this offense is not mandated by the Constitution of the respective states nor by the United States Constitution.

The Nevada Court finds that the *Baldwin* "Bright-Line" is the only criteria to consider in determining the right to trial by jury. Chief Justice Gunderson of the Nevada Supreme Court, taking a judiciously pragmatic view, traces the Constitutional history of the right to a jury in *Blanton v. North Las Vegas,* 748 P.2d 494 (Nev., 1987). His conclusions for the Nevada High Court, considering both case law and policy, provide an objective constitutional rule. According to the Nevada Supreme Court, the doctrines of both *Callan v. Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888) and *District of Columbia v. Colts,* 282 U.S. 63 51 S.Ct. 52, 75 L.Ed. 177 (1930) have been sub silento replaced by the objective "Bright-Line" test of *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970).

There is certainly adequate authority for this viewpoint. Early decisions such as *Colts* and *Callan* explained the right to a trial by jury in a classically historical context. For example, in *Callan,* the court declared a Constitutional mandate for the right to a jury in trials of offenses indictable at common law, *Callan v. Wilson,* 127 U.S. 540, 557, 32 L.Ed. 223, 228, 8 S.Ct. 1301 (1888). By so doing, the *Callan* court remained true to the now-obsolete doctrine of original intent.

Later, in *Colts,* though not stating as much, the Supreme Court recognized what the United States Fifth Circuit en banc in *Landry v. Hoepfner,* 840 F.2d 1201 (5th Cir. 1988) calls offenses "without common law antecedents," 840 F.2d and 1209, thus exposing the "troublesome gap" the *Callan* rule leaves due to the plethora of post-common law offenses. Thus, the *Colts* court declared that any offense that is **malum in se,** or evil in and of itself, requires the availability of a jury trial to criminal defendants, *District of Columbia v. Colts,*

282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 77 (1930).

Neither the Louisiana Supreme Court nor the United States Fifth Circuit are willing to assume, as does the Nevada Supreme Court, that *Callan* and *Colts* have been overruled sub silentio in favor of the preferable objective "Bright-Line" rule first foreshadowed in *District of Columbia v. Clawans,* 300 U.S. 617, 846, 57 S.Ct. 660, 624, 81 L.Ed. 843, (1937) and *Duncan v. Louisiana,* 391 U.S. 45, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), and finally articulated in *Baldwin.* Because of this hesitancy, the *Landry* battle rested on whether DWI, La.R.S. 14:98, was either indictable at common law or evil in and of itself. While *Bairnsfather v. Louisiana,* 107 S.Ct. 1620 (1987) certainly lends credence to the interpretation on the law as read by the Nevada Supreme Court, only a positive, unequivocal statement by this Court can ever lay to rest this controversy.

It is respectfully submitted by the Louisiana District Attorneys Association that the Nevada Supreme Court is correct. Once this Honorable Court announced its decision in *Baldwin* that the "near uniform judgment of the nation" as to the seriousness of the offense is "the only objective criterion by which a line could ever be drawn . . . on the basis of the possible penalty alone . . .", 90 S.Ct. at 1890 (quoted p. 498 *Blanton*), the subjective tests enunciated in both *Callan* and *Colts* were effectively discarded.

Should this Honorable Court determine, however, that the tests enunciated in *Colts* and *Callan* survived *Baldwin,* then it is respectfully submitted that DWI was neither indictable at common law nor **malum in se.**

ARGUMENT

Supreme Court "Bright-Line" Analysis

Although the Sixth Amendment of the United States Constitution provides that, in all criminal prosecutions, the accused shall enjoy the right to trial by an impartial jury, the United States Supreme Court has limited that right to offenses classified as "serious". In *Callan v. Wilson,* 127 U.S. 540, 557, 8 S.Ct. 1301, 32 L.Ed. 223, 228 (1888), the Court stated that " 'in that class or grade of offenses called petty offenses, which, according to the common law, may be proceeded against summarily in any tribunal legally constituted for that purpose,' a jury trial is not required." Later the Court reiterated, in *District of Columbia v. Clawans,* 300 U.S. 617, 624, 81 L.Ed. 843, 846, 57 S.Ct. 600 (1937) that: " 'It is settled by the decisions of this Court . . . that the right of trial by jury . . . does not extend to every criminal proceeding. At the time of the adoption of the Constitution there were numerous offenses, commonly described as "petty," which were tried summarily without a jury . . . .' "

In recent decisions, beginning with *Duncan v. Louisiana* 391 U.S. 45, 88 S.Ct. 1444, 20 L.Ed. 2d 491 (1968), the Supreme Court has developed definite guidelines for and attitudes toward offenses which are exempt from trial by jury. These emphasize the maximum penalty as the major relevance in determining whether or not a crime is serious and that classification of criminal offenses is largely a state matter as long as it does not violate clear federal constitutional requirements. *Cheff v. Schnackenburg,* 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966) (In determining the seriousness of the crime the court should refer to existing laws and practices in the Nation; that the penalty authorized for a particular crime is a major relevance in determining whether it is serious or not.). *Frank v. United States,* 395 U.S. 147, 148, 89 S.Ct. 1503, 1504, 23 L.Ed. 2d 162, 166 (1969) (the most relevant indication of the seriousness of an offense is the severity of the penalty authorized

for its commission.). *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) (Repeated the need for objective criteria which reflected the seriousness with which society regards the offense and found the most relevant such criteria in the severity of the maximum authorized penalty.). *Argesigner v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) ("We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. How crimes should be classified is largely a state matter."). *Welsh v. Wisconsin,*466 U.S. 740, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984) (The Supreme Court determined the classification of DWI as non felonious, or not a serious crime.). *United States v. Jenkins,* 780 F.2d 472 (4th Cir. 1986) cert. denied, _____ U.S. _____, 106 S.Ct. 2283, 90 L.Ed.2d 724 (1986) (The United States Supreme Court refused to review this opinion which examined and affirmed South Carolina's classification of a first offense DWI as nonserious).

In summation, the Supreme Court's attitudes in the foregoing cases reflect that crimes which carry possible penalties up to six months do not require a jury trial if they otherwise qualify as "petty" offenses but the penalty authorized for a particular crime is a major relevance in determining whether it is serious or not. The analysis of whether a crime is "petty" or not should refer to objective criteria, chiefly the existing laws and practices in the Nation. As a general rule, however, the classification of state criminal offenses is largely a state matter as long as it does not violate clear federal constitutional requirements.

Petty v. Serious

Under the Supreme Court's penalty analysis, DUI in Nevada and DWI in Louisiana do not qualify as offenses which require a trial by jury. The question then becomes whether DWI qualifies as a petty or serious offense. The courts have defined the following classes of offenses as

meeting the Constitutional threshold to be considered serious or non-petty for the purpose of determining whether a jury trial is required:

1. Offenses that are **malum in se,** *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 77 (1930).
2. Offenses that were subject to indictment at common law, *Callan v. Wilson,* 127 U.S. 540, 8 S.Ct. 1301, 32 L.Ed. 223 (1888).
3. Offenses with severe penalties, *District of Columbia v. Clawans,* 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). See also *Baldwin v. New York,* 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970);

Misdemeanor DWI fits none of the jurisprudentially defined classfications of "serious" offenses.

1) Whether The Offense Of DWI Is Malum In Se Or Malum Prohibitum

An offense is **malum prohibitum** when it proscribes some behavior that in itself is not morally offensive, or it is at the "first and lowest" stage of the prohibited behavior, *United States v. Stewart,* 568 F.2d 501 (9th Cir. 1978), or it is a reasonable regulation to carry out a stated purpose. *United States v. Arbo,* 691 F.2d 862 (9th Cir. 1982). Black's Law Dictionary, 712 (5th ed. 1979), defines "mala prohibita" as prohibited wrongs or offenses; acts which are made offenses by positive laws, and prohibited as such. Acts or omissions which are made criminal by statute but which, of themselves, are not criminal. Generally, no criminal intent or **mens rea** is required and the mere accomplishment of the act or omission is sufficient for criminal liability. The term is used in contrast to **mala in se** which are wrongs in and of themselves such as robbery.

Thus, each state's legislature has the power to create crime without requiring the mental element of "specific intent". Specific intent is not a necessary element and in such cases doing the act constitutes the crime. 22 C.J.S. Criminal Law §30 p. 102 (1961). It is the intention to do the forbidden act which is sufficient and the doer may be criminally liable even though he had no knowledge the act was criminal, had no intention to violate the law or was even ignorant as to the law's existence. 22 C.J.S. §30 p. 100 (1961). These **mala prohibita** offenses are "in the nature of neglect where the law requires care, or inaction where it imposes a duty." *Morissette v. United States,* 342 U.S. 246, 72 S.Ct. 240, 246, 96 L.Ed.2d 288 (1952). Many violations of such regulations do not result in "direct or immediate injury to person or property but merely create the danger or probability of which the law seeks to minimize." These violations may be considered offenses against the state's authority and their occurrences upset the ability of a state to maintain social order. *Id.,* at 246.

In contrast, Black's Law Dictionary, 712 (5th ed. 1979), defines **malum in se** as "a wrong in itself; an act or case of natural, moral, and public law. *Grindstaff v. State,* 214 Tenn. 58, 377 S.W.2d 921, 926; *State v. Shedoudy,* 45 N.M. 516, 118 P.2d 280, 287. An act is said to be **malum in se** when it is inherently and essentially evil, that is, immoral in its nature and injurious in its consequences, without any regard to the fact of its being noticed or punished by the law of the state. Most of the offenses cognizable at common law are such **malum in se** offenses (without the denouncement of a statute); as murder, larceny, etc." Hence, the concept of **malum in se** is inexorably tied to those crimes at common law.

The United States Supreme Court in *Morissette v. United States,* supra, identified the requirement of a culpable state of mind of the doer in prescribing those offenses that are "malum in se". Any injury can amount to a crime only when inflicted by intention. *Morissett,* supra, at 243. "(T)o

constitute any crime there must first be a "vicious will' " (*Morissette,* supra at 244, quoting Blackstone, 4 Bl.Comm 21). It is this vicious will, or the "intent" to commit an evil act, coupled with the doing of the evil act that causes an offense to be criminal. "Intent", therefore, forms the requisite "mental element" inherent in **malum in se** offenses. Thus, when an offense is morally offensive it is considered **malum in se,** however, these offenses are usually based on common law crimes where a specific intent requirement is incorporated into a definition of the offense. *United States v. Hussein,* 675 F.2d 114 (6th Cir. 1982); Morissette v. United States, supra.

Louisiana's DWI statute[1] does not incorporate specific intent into the offense and is classified as a general intent crime. Moreover, the statute is prohibitory; it proscribes an activity which in itself is not reprehensible. A violation of DWI results in no direct or immediate injury to person or property but merely creates the danger or possibility of it which the law seeks to minimize. Such a violation is basically against the authority of the state irrespective of the intent of the violator. As the Court in *Morissette,* supra, at 246, said in discussing regulatory statutes, "The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."

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[1]La.R.S. 14:98 Operating a vehicle while intoxicated

A. The Crime of operating a vehicle while intoxicated is the operating of any motor vehicle, aircraft, watercraft, vessel, or other means of conveyance when:

(1) The operator is under the influence of alcoholic beverages; or

(2) The operator's blood alcohol concentration is 0.10 percent or more by weight based on grams of alcohol per one hundred cubic centimeters of blood; or

(3) The operator is under the influence of any controlled dangerous substance listed in Schedule I, II, III IV, or V as set forth in R.S. 40:964.

A technical violation of the DWI statute can be likened to running a red light: if there are oncoming vehicles and the offender recklessly fails to stop, the results can be tragic. Alternatively, at three in the morning, on a deserted strip of highway, a cautious driver proceeding before the cycle has completed, has not committed a "serious" offense. State legislatures, the judiciary and Constitution recognize this and classify running a red light as a petty offense. Similarly, a cautious driver violating no other statutes or ordinances, can be guilty of DWI with a blood alcohol content of 0.10%. This can be true even if the offender's reflexes are not impaired to the extent that the average person's would be at that blood alcohol level. The offender has no criminal intent and causes no harm. Thus, the crime of DWI, by itself, is clearly **malum prohibitum:** a forbidden behavior with potential for danger.

Moreover, if the prohibited behavior of DWI involves bodily injury, property damage or death, there are other chargeable offenses which reflect the more serious consequences. If an offender, in addition to violating the DWI statute, is driving recklessly, the offense becomes by its nature serious. If, on the other hand, an offender operates a vehicle, otherwise lawfully, and is arrested at a roadblock for DWI, the offense he has committed does not fit the traditional definition of **malum in se.**

Hence, after reviewing the history and elements of **malum prohibitum** and **malum in se** in regard to a DWI violation, it must be classified as **malum prohibitum** since there is no specific intent nor force or violence incorporated into the offense itself but merely prohibitory language.

2) Whether The Criminal Act Was Indictable At Common Law

Obviously, the offense of misdemeanor DWI was not an offense indictable at common law since automobiles did not exist at the time of the formulation of the list of such

offenses. The development of a motorized vehicle as the major mode of travel has also promoted the development of paved, well-marked roadways, traffic control devices, and increased speeds unimaginable at common law. Society's attitudes toward travel and speed have changed so dramatically that a comparison of driving an automobile or 18-wheeler with a horse drawn buggy is unjust. An example of society's current attitude toward speed and accident is the recent increase in the speed limit on the Nation's highways from 55 miles per hour to 65 miles per hour despite the statistics which show that increased speed increases accidents and deaths on our highways. Hence, the common law offers no guidance in the area of traffic control and offenses because of the technical advances and corresponding changes in society's perceptions and values.

Petitioners below have misquoted *District of Columbia v. Colts,* 282 U.S. 63, 51 S.Ct. 52, 75 L.Ed. 177 (1930), as authority for recognizing misdemeanor DWI as constitutionally "serious". In fact, the statutory violation in *Colts* is distinguished from a statutory violation of misdemeanor DWI. Defendant in *Colts* violated a District of Columbia traffic code which prohibited driving more than 22 miles per hour except in certain areas. In addition, the statute enumerated more serious violations in section (b), with which this defendant was also charged: (b)(1)(2)(3); (1) recklessly; (2) at a rate of speed greater than is reasonable and proper, having regard to the width of the public highway, the use thereof, and the traffic thereon; (3) in such a manner and condition so as to endanger property and individuals. Thus the opinion analyzes a violation that has more elements, with possible serious consequences, than a violation of DWI. In fact, the offenses in question in the *Colts* case were "operating a certain motor vehicle at a greater rate of speed than . . . was reasonable and proper . . . in such a manner and condition so as to endanger property and individuals.

The statute in question included speeding *and* [emphasis ours] reckless operation but not DWI. It was this statute that

the *Colts* court found to be the equivalent of a crime indictable at common law Id., 282 U.S. at 73, 51 S.Ct. at 53, 75 L.Ed. at 179.

In reaching its decision in *Colts*, supra, the Court relies on *State v. Rodgers*, 102 A. 433 (N.Y. 1917) for its analysis. *Rodgers*, to the contrary, found that the "driving of an automobile upon a public street, while under the influence of intoxicating liquor is not a public or common nuisance indictable at common law." 102 A. 434. Once again the offense of DWI was not deemed a public nuisance until another element (in *Colts*, reckless operation) is added.

3) Whether The Collateral Consequences Of A DWI Conviction Are Relevant To Its Classification

The final category of offenses that are deemed serious for the purposes of triggering the right to a jury trial are those carrying a penalty so severe, that an otherwise trivial offense must be regarded as non-petty, and entitle the accused to a trial by jury. See *District of Columbia v. Clawans*, 300 U.S. 617, 57 S.Ct. 660, 81 L.Ed. 843 (1937). The Court has ruled specifically on the "Bright-Line" beyond which a penalty would engage the right to a trial by jury. This "Bright-Line" is the possibility of six months imprisonment, *Baldwin v. New York*, 399 U.S. 66, 90 S.Ct. 1886, 26 L.Ed.2d 437 (1970) and *Frank v. United States*, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969). Assuming the penalty does not exceed this limit, the Court may examine whether "the severity of the punishment, by itself, [is] sufficient to take the offense out of the petty category", *United States v. Sanchez-Mesa*, 547 F.2d 461, 464 (9th Cir. 1976) citing *Clawans*, infra. It is significant that the United States Supreme Court speaks not to the "collateral consequences" of a conviction but to the "severity of the penalty."

It is submitted that the collateral consequences of a conviction are not determinative of the seriousness of a crime.

A review of the collateral consequences of a misdemeanor DWI conviction reveals that those consequences do not qualify it as a serious crime for purposes of a constitutional right to trial by jury.

In lieu of a jail sentence for a DWI conviction, a defendant in Louisiana is usually placed on probation with the conditions that he attend a substance abuse program, a driver's education program and perform four eight-hour days of community service. These conditions certainly reflect rehabilitative consequences as opposed to penal ones. They also reflect a legislative decision that a first offense DWI is a regulatory measure in the exercise of what is called police power where the emphasis of the statute is evidently upon achievement of some social betterment rather than the punishment of the crime, as in the case of "malum in se". See *Morissette v. United States*, 342 U.S. 258, 72 S.Ct. at 247. Thus, the conditions of probation represent the legislative intent of social betterment in the classification of DWI as **malum prohibitum.**

It is argued that the possible loss of license as an additional consequence of a DWI conviction should classify it as **malum in se.** This argument fails to acknowledge that there are statutes which provide a remedy for persons whose suspension of driving privileges will deprive him or his family of the necessities of life, or will prevent him from earning a livelihood. Furthermore, in Louisiana, loss of a driver's license is also a collateral consequence of failure to stop or passing a school bus which is stopped for loading or unloading children, failure to stop and render aid as required under the laws of this state, three charges of reckless driving committed within a period of twelve months, violations of R.S. 32:414.1, constituting an unlawful use of driver's license, and for other enumerated serious and petty offenses. Hence, loss of license is a consequence of numerous petty as well as felonious offenses and can hardly be used to classify this behavior as **malum in se.** Moreover, the threatened loss of livelihood is provided for by the issuance of a restricted license.

It is further argued that a DWI conviction is held in general scorn and opprobrium by our society as reflected by the publishing of names and addresses of arrestees. This argument fails to consider that the vital information of arrestees for other crimes is also published in the daily newspaper: theft, simple criminal damage to property, battery, possession of marijuana, assult - all classified as misdemeanor, or petty offenses in Louisiana for which a trial by jury is not available. There is no basis to assume that a DWI arrest would carry any more stigma than an arrest based on other misdemeanor charges.

Finally, it is claimed that the insurance consequences of a DWI conviction contribute to the basis of its classification as a serious offense. This reasoning can also be applied to most other minor moving violations for motor vehicles. Thus, using the collateral consequences reasoning, a violation of driving 25 miles per hour in a 20 mile per hour zone should have a right to a trial by jury since most of the aforementioned consequences are applicable.

It is clear that the other so-called "catastrophic" consequences of a DWI conviction are all well within the court's discretion on other misdemeanors. Substance abuse treatment, social services, education, community and incarceration are all tools used by courts in other petty offenses.

The Supreme Court has yet to require trial by jury for all offenses whether petty or serious and Louisiana's and Nevada's classifications of its vehicular regulatory statutes as "petty" should be maintained.

CONCLUSION

With the enunciation of *Baldwin's* "Bright-Line" test, the tests of *Colts* and *Callan* were overruled **sub silentio.** Since a violation of Louisiana's DWI statute does not carry a penalty which crosses *Baldwin's* "Bright-Line", those charged with first offense DWI have no constitutional right to a trial by jury.

Should this Honorable Court determine that *Colts* and *Callan* are still valid legal constitutional interpretations of the right to a trial by jury, then it is respectfully submitted that the offense for which the appellant was convicted does not fit any of the classifications recognized by the courts as entitling defendant to a trial by jury. The decision in *United States v. Craner,* 652 F.2d 23 (9th Cir. 1981) misinterprets *Colts* as precedent for DWI and **malum in se.**

The Louisiana Legislature clearly defines this offense as one which should be tried before a judge alone. The State has positively and properly exercised its police power in a manner that conforms to the decisions of the United States Supreme Court.

Considering the foregoing law and argument, the classification of DWI, or a DUI, as a "petty" offense, a misdemeanor, without the right to a trial by jury, does not violate Federal Constitutional standards nor does it otherwise qualify as a "serious" offense such that a defendant has a right to trial by jury and the decision of the Supreme Court of Nevada should be affirmed.

Respectfully Submitted,

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No. 87-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON and MARK D. FRALEY,

Petitioners,

-v.-

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF AND APPENDIX OF *AMICUS CURIAE* STATE OF NEW JERSEY IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

This case involves a determination of whether, under Nevada state law, the offense of driving while intoxicated constitutes a "serious" offense which entitles a defendant to a trial by jury under the United States Constitution. *Amicus*, the State of New Jersey, has never provided jury trials for drunk driving offenses, either at common law or under statutory prescription. *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917); *State v. Linnehan*, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), certif. den. 99 N.J. 236, 491 A.2d 723 (1985); *State v. Zoppi*, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984). Under present law, defendants receive a bench trial in municipal court (court of limited jurisdiction), after which they are entitled to a trial *de novo* on the municipal court record in the Superior Court (court of statewide jurisdiction). N.J. Stat. Ann. § 2A:8-21a (West 1987) (App. A, p. 1a); New Jersey Court Rules 7:6-1 (App. A, p. 15a); 3:23-1 (App. A, p. 13a); 3:23-8 (App. A, p. 13a). Thereafter, a defendant may pursue an appeal as of right to the Appellate Division (intermediate appellate court) and request discretionary review by the New Jersey Supreme Court. New Jersey Court Rules 2:2-3(a)(1) (App. A, p. 12a); 2:12-3a (App. A, p. 13a).

New Jersey's current penalties for third and subsequent violators of the offense of operating a motor vehicle under the influence of intoxicating liquor are comparable to the Nevada penalties being considered by this Court in that they include: a term of incarceration of 180 days,[2] subject

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[1] *Amicus Curiae*, the State of New Jersey, sponsored by its Attorney General, files this brief in support of respondent pursuant to Rule 36.4 of the Rules of the Supreme Court of the United States.

[2] While the relevant statutory language reads "not less than 180 days," N.J. Stat. Ann. § 39:4-50(a)(3) (App. A, p. 6a), judicial construction and application of this phrase ensure that 180 days is the maximum authorized period. *State v. Ferretti*, 189 N.J. Super. 578, 461 A.2d 193 (Law Div.), *certif. den.* 94 N.J. 606, 468 A.2d 238 (1983).

to reduction by up to ninety days of community service; a $1000 fine; loss of driving privileges for ten years; a motor vehicle insurance surcharge of $1500 per year for three years; an additional $100 surcharge payable to a Drunk Driving Enforcement Fund; and payment of an $80 fee for and screening by the Division of Alcoholism's Intoxicated Driving Programs Unit. N.J. Stat. Ann. §§ 39:4-50(a)(3) (West 1973 & Supp. 1988) (App. A, p. 6a); 39:4-50.8 (West Supp. 1988) (App. A, p. 11a); 17:29A-35b(2) (West 1985 & Supp. 1988) (App. A, p. 3a). Second offenders are subject to potential incarceration of ninety days, two days of which are mandatory; thirty days of community service; between $500 and $1000 fine; and two years' license revocation. N.J. Stat. Ann. § 39:4-50(a)(2) (West 1973 & Supp. 1988) (App. A, p. 6a). First offender penalties include potential incarceration of thirty days; a mandatory term of two consecutive days (at least six hours per day) at an Intoxicated Driver Resource Center; $250 to $400 fine; and loss of license for a period between six months and one year. N.J. Stat. Ann. § 39:4-50(a)(1) (West 1973 & Supp. 1988) (App. A, p. 5a). Surcharges are also applicable to first and second offenders at lower rates. N.J. Stat. Ann. 17:29A-35b(2) (West 1985 & Supp. 1988).

As a result of these potential penalties, and a bar against plea bargaining for drunk driving offenses, New Jersey's municipal courts are facing an ever-increasing caseload of drunk driving prosecutions.[3] Consequently, this Court's ultimate resolution of the case at bar could substantially

[3] The New Jersey Administrative Office of the Courts reports that in 1987, a total of 42,575 drunk driving cases were processed in the municipal courts of New Jersey. Of that number, 8,429 trials were held. There were also 294,121 dispositions of disorderly persons and petty disorderly persons offenses in the municipal courts in 1987; of these dispositions, 50,706 were trials. Finally, the aggregate number of criminal trials for indictable offenses held in New Jersey superior courts in 1987 was 2,050. Of this latter number, in only 174 did defendants waive trial by jury. These figures demonstrate that granting jury trials for drunk driving—let alone for other "petty" offenses—would dramatically increase the number of offenses tried by jury in New Jersey.

affect the enforcement of, and disposition of violators under, the drunk driving law in this State.

Additionally, the maximum punishment for various disorderly persons offenses in New Jersey is currently six months' incarceration, a $1000 fine and a $30 penalty payable to the Violent Crimes Compensation Board. N.J. Stat. Ann. §§ 2C:43-3c (West 1982 & Supp. 1988) (App. A, p. 2a); 2C:43-3.1a(2)(a) (West 1982 & Supp. 1988) (App. A, p. 2a); 2C:43-8 (West 1982) (App. A, p. 2a). Although N.J. Const. (1947) art. 1, para. 10 (App. A, p. 16a) guarantees jury trials for crimes, both statute and case law limit the definition of "crime" to those offenses carrying a maximum term of incarceration in excess of six months. *State v. Owens*, 54 N.J. 153, 254 A.2d. 97 (1969), *cert. denied* 396 U.S. 1021 (1970); N.J. Stat. Ann. § 2C:1-4 (West 1982). Thus, jury trials are not available for these disorderly persons offenses. Notwithstanding petitioners' professed intent to isolate only the offense of driving while intoxicated for purposes of their jury trial demand, it is clear that any decision by this Court compelling a jury trial for any offense—including Nevada's drunk driving offense—carrying a term of incarceration of six months or less would have far-reaching and disruptive implications for the prosecution of a variety of offenses not only in this State, but in many jurisdictions throughout the nation.

New Jersey maintains a strong interest in the efficient and effective administration of its criminal justice system. We therefore join as *amicus* in support of respondent's assertion that petitioners are not entitled to jury trials and urge this Court to affirm the judgment of the court below.

SUMMARY OF ARGUMENT

1. In defining the scope of the Sixth Amendment's right to jury trial, this Court has long recognized that the right

does not extend to "petty" offenses, but is limited to "serious" crimes. Although earlier decisions focused upon the nature of the offense and whether it was indictable at common law, recent opinions—*Duncan v. Louisiana*, 391 U.S. 145 (1968); *Frank v. United States*, 395 U.S. 147 (1969); and *Baldwin v. New York*, 399 U.S. 66 (1970)—have abandoned consideration of these factors in favor of a reliance upon the penalties that might be imposed. Later decisions have interpreted these cases as establishing a bright line between "petty" and "serious" offenses—a line that coincides with the congressional maximum of six months' incarceration for federal petty offenses. The development of this Court's case law therefore evinces a contemporary rule requiring jury trials only for offenses carrying a maximum authorized term of confinement exceeding six months.

2. If it has not already done so, this Court should clearly enunciate a bright line rule which would provide a constitutional right to a jury trial if and only if the maximum authorized term of incarceration exceeds six months. Without a bright line rule, the boundaries of the "petty" offense category will remain ill-defined, and will impede the prosecution of "petty" and "serious" offenses. Consideration of factors other than incarceration render difficult the formulation of a bright line rule; injection of subjective and time-variable factors such as public perception of the seriousness of the offense or other states' classifications of the offense render the "petty" versus "serious" analysis particulary unstable. The maximum term of incarceration is the most reliable indicator of the seriousness with which a state views the offense and should be the only factor relevant to a defendant's right to a jury trial. This Court's case law allowing penalties other than incarceration to be imposed by civil or administrative mechanisms supports a rule excluding consideration of these penalties in determining whether an offense is "petty." Due process limitations upon a state's ability to incarcerate defendants for

failure to pay a fine ensure that legislative bodies will not choose short imprisonments and large fines to avoid jury trials for "serious" offenses and thus support a rule considering only incarceration, and not fines, in the "petty offense" analysis. Problems associated with making mandatory minimum terms relevant for "petty offense" analysis should foreclose deviation from this Court's rule focusing upon the maximum potential, rather than the actual term imposed.

3. Even without a bright line rule focusing upon the maximum term of incarceration, the additional considerations proposed by petitioners do not demonstrate their entitlement to a trial by jury. Drunk driving was not indictable at common law and is not an offense *malum in se*. The existing laws and practices of other jurisdictions with respect to drunk driving establish no clear national consensus concerning the seriousness of this offense.

4. Nevada has a legitimate state interest in not providing jury trials for first-offender drunk drivers. Bench trials are speedy and inexpensive, and fully protect petitioners' constitutional rights. They also help to guarantee speedy trials in the prosecution of all crimes.

LEGAL ARGUMENT

POINT I

THE DEVELOPMENT OF THIS COURT'S CASE LAW EVINCES A CONTEMPORARY RULE REQUIRING JURY TRIALS ONLY FOR OFFENSES CARRYING A MAXIMUM AUTHORIZED TERM OF INCARCERATION EXCEEDING SIX MONTHS.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . ." In defining the scope of the Sixth Amendment's guarantee, this Court has long recognized that the right to trial by jury does not extend

to "petty" offenses but is limited to "serious" crimes.[4] The problem faced by this Court has been "to draw a line in the spectrum of crime, separating petty from serious infractions." *Duncan v. Louisiana*, 391 U.S. 145, 160-161 (1968). While this Court has from time to time considered a variety of factors pertinent to this task, recent developments in this Court's case law evince a contemporary rule requiring jury trials only for offenses carrying a maximum authorized term of confinement exceeding six months.

While the question concerning the exact location of the line between "petty" and "serious" offenses arguably survived the *Duncan* decision, this Court did determine that the crime at issue in *Duncan*, a crime punishable by two years' imprisonment, clearly fell on the "serious" side of the line. *Id.* at 161-162. Two years later, a three member plurality of this Court, referring to Congress's definition of petty offenses, extended the jury trial rule of *Duncan* to any state criminal offense in which the authorized period of confinement exceeded six months. *Baldwin v. New York*, 399 U.S. 66 (1970). The Court's treatment of this issue in *Duncan* and *Baldwin* differed from this Court's analyses in prior cases.

In *Callan v. Wilson*, 127 U.S. 540 (1888), this Court rejected the contention that the right to trial by jury was limited to felonies or crimes punishable by confinement in a penitentiary. *Id.* at 549. *Callan* involved the crime of conspiracy, an offense indictable at common law. Given the status of the offense at common law, the *Callan* Court held that conspiracy could not be prosecuted summarily

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[4] *Baldwin v. New York*, 399 U.S. 66 (1970); *Frank v. United States*, 395 U.S. 147 (1969); *Duncan v. Louisiana*, 391 U.S. 145 (1968); *Cheff v. Schnackenberg*, 384 U.S. 373 (1966); *District of Columbia v. Clawans*, 300 U.S. 617 (1937); *District of Columbia v. Colts*, 282 U.S. 63 (1930); *Natal v. Louisiana*, 139 U.S. 621 (1891); *Callan v. Wilson*, 127 U.S. 540 (1888).

without benefit of trial by jury. *Id.* at 556. The issue surfaced again in *Schick v. United States*, 195 U.S. 65 (1904), which involved a prosecution for violation of a revenue statute. After noting that both the nature of the offense and the authorized punishment indicated only a petty offense, the Court, relying on *Callan*, again emphasized the necessity of evaluating constitutional provisions concerning the right to trial by jury "in the light of the common law." *Schick*, 195 U.S. at 69. Finally, in *District of Columbia v. Colts*, 282 U.S. 63 (1930), this Court determined that since reckless driving was an offense indictable at common law, the accused was entitled to trial by jury.

In *District of Columbia v. Clawans*, 300 U.S. 617 (1937), this Court confronted the issue in the context of an offense not indictable at common law. The defendant in *Clawans* was charged with dealing in secondhand property without a license, an offense punishable by ninety days' imprisonment. *Id.* at 623. Having determined that the offense was not indictable at common law, this Court conceded that an otherwise "trivial" statutory offense may, by virtue of "the severity of the penalty," acquire the status of a "serious" offense entitling the accused to trial by jury. *Id.* at 625. This Court thus turned to the question whether a nonindictable offense may be brought within the realm of crimes for which the accused is entitled to trial by jury solely by virtue of the authorized punishment. *Id.* By reference to the common law, in this case to English and Colonial statutes in existence at the time the Constitution was adopted, this Court discerned that an authorized period of confinement in excess of ninety days was not an uncommon punishment for petty offenses tried summarily. *Id.* at 626-627. In resolving the issue whether a given penalty could elevate an otherwise "petty" offense to the "serious" category, this Court noted:

> [W]e may doubt whether summary trial with punishment of more than six months' imprisonment,

> prescribed by some pre-Revolutionary statutes, is admissible, without concluding that a penalty of ninety days is too much. Doubts must be resolved, not subjectively by recourse of the judge to his own sympathy and emotions, but by objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments.
>
> Congress itself, by measuring the punishment in this case in conformity to the commonly accepted standard when the Constitution was adopted, and declaring that it should be applied today unless found to transgress constitutional limitations, has expressed its deliberate judgment that the punishment is not too great to be summarily administered. [*Clawans*, 300 U.S. at 627-628].

In *Duncan*, this Court, continuing the evolving theme of *Clawans*, did not refer to the common law status of the charged offense, but relied exclusively upon the length of the authorized prison term. In other words, this Court declined to determine whether simple battery constituted an indictable offense at common law, observing instead that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not" and noting that the authorized penalty "may be taken 'as a gauge of [the locality's] social and ethical judgments' of the crime in question." *Duncan*, 391 U.S. at 159, 160 (citation omitted).

Frank v. United States, 395 U.S. 147 (1969), echoed the *Duncan* Court's search for an objective benchmark of seriousness. Referring to *Clawans* and *Duncan*, this Court identified the severity of authorized punishment as "[t]he most relevant indication of the seriousness of an offense . . . ." 395 U.S. at 148. Moving in the same direction in *Baldwin*, this Court again did not concern itself with the question whether the crime of "jostling" was an indictable offense at common law, but found the authorized one year

sentence to constitute the most relevant indication of the seriousness of the crime. 399 U.S. at 69. Significantly, the *Baldwin* Court went on to hold that no offense carrying an authorized penalty in excess of six months can be characterized as "petty" for purposes of the right to trial by jury. *Id.* at 73-74. Subsequent decisions of this Court have interpreted *Duncan* and its progeny as establishing a bright line between "petty" and "serious" offenses—a line that coincides with the congressional maximum of six months' imprisonment for federal petty offenses. *Codispoti v. Pennsylvania*, 418 U.S. 506, 512 (1974). *See Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984) (penalty for particular offense provides clearest and most consistent indication of State's interest in arresting individual for a given offense); *Argersinger v. Hamlin*, 407 U.S. 25, 29 (1972).

Three points can be gleaned from the relevant case law. First, perhaps due to the emergence of statutory offenses unknown to the common law, this Court has moved away from assessments of the common law nature of the offense, see *Colts* and *Callan*, as the determinative, or even a relevant factor concerning the right to trial by jury. *See Landry v. Hoepfner*, 840 F.2d 1201, 1209 (5th Cir. 1988) (en banc), *petition for cert. filed* June 13, 1988; *Justiniano Matos v. Gaspar Rodriguez*, 440 F. Supp. 673, 676-677 (D.P.R. 1976). Second, this Court has never deemed an offense "serious" unless it was indictable at common law, or unless it subjected an offender to confinement in excess of six months. Absent at least one of these factors, none of the other considerations which appear to have played a role in the early decisions of this Court has ever been held sufficient to merit a jury trial. *Landry v. Hoepfner*, 840 F.2d at 1209. Third, the maximum authorized period of confinement for any given crime supplies the most accurate indicator of the seriousness with which society regards the offense. Contemporary responses to criminal acts are necessarily subsumed in and accounted for by the max-

imum custodial penalty authorized for a given offense. *Welsh v. Wisconsin* 466 U.S. at 754 n.14; *Duncan v. Louisiana*, 391 U.S. at 160.

This Court should maintain the course charted in its recent cases and apply a bright line rule of six months' incarceration to determine which offenses are "petty" and which offenses are "serious" for purposes of Sixth Amendment jury trial analysis. Even if a rule of this nature is not preordained by this Court's decisional authority, it should now be adopted as the most sensible and workable manner of deciding whether petitioners are entitled to jury trials.

POINT II

THIS COURT SHOULD ENUNCIATE A BRIGHT LINE RULE PROVIDING A RIGHT TO JURY TRIAL ONLY IF THE MAXIMUM AUTHORIZED TERM OF INCARCERATION EXCEEDS SIX MONTHS.

Amicus State of New Jersey urges this Court clearly to enunciate a bright line rule which would provide a constitutional right to a jury trial if and only if the maximum authorized term of incarceration exceeds six months.[5] All other factors, including the maximum authorized fine, the collateral consequences of conviction (including license suspension), factors intrinsic to the proscribed conduct (including whether it was indictable at common law) and statutory requirements for a minimum term of incarceration should be irrelevant. Several policy considerations support the explicit adoption of this bright line rule. The rule, if not compelled by this Court's case law, is certainly consistent with it and logically follows from it.

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[5] However, we support the exception noted in *Duncan v. Louisiana*, 391 U.S. 145, 162 n.35 (1968), for the offense of contempt of court, under which the penalty actually imposed, rather than the maximum authorized penalty, is the determinative factor. That exception and the reasons for it are not generally applicable, and are not germane to this case.

There is a need for a bright line rule. Without it, "the boundaries of the petty offense category . . . [will remain] ill-defined, if not ambulatory." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968). The states' (and the federal government's) interest in prosecuting both "serious" and "petty" offenses is too important to admit uncertainty as to whether a given offense is "serious," thus requiring a jury trial, or "petty," thus subject to "speedy and inexpensive nonjury adjudications." *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Under the various amorphous tests proposed by petitioners, the uncertainty is omnipresent; even this Court's adjudication today that a given offense is "petty" would not necessarily be valid next year if, in the intervening period, the public perception of the seriousness of the offense changed. (Petitioners' brief at 19-20). Without a bright line rule, the distinction between "petty" and "serious" offenses would essentially remain the subjective determination of judges, and friction between the federal and state judiciary (as has occurred in Nevada) would be inevitable. *Compare United States v. Craner*, 652 F.2d 23 (9th Cir. 1981) *and Bronson v. Swinney*, 648 *F. Supp.* 1094 (D. Nev. 1986) *with Blanton v. North Las Vegas Municipal Court*, 103 Nev. 135, 748 P.2d 494 (1987). It is difficult for prosecutors to prosecute if they are uncertain regarding something so elementary as whether a jury is necessary. In this aspect of the law, this Court has noted the wisdom of employing "objective criteria," *Duncan v. Louisiana*, 391 U.S. at 161; a bright line rule meets this goal, and the goal of certainty.

The "most relevant" objective criteria reflecting the seriousness of an offense may be found "in the severity of the maximum authorized penalty." *Baldwin v. New York*, 399 U.S. at 68. Petitioners argue that in examining the "severity of the maximum authorized penalty," courts should consider not only the maximum term of incarceration, but also the authorized fines and collateral consequences (such as license revocation and increases in

automobile insurance costs). It is difficult to establish a bright line rule if penalties other than incarceration are relevant. This, however, is not the primary reason for excluding consideration of penalties other than incarceration.

As a general rule, incarceration is the only penalty for which Sixth Amendment application is mandatory. At their option, legislative bodies may impose other penalties, including restitution, pecuniary penalties and even revocation of professional licenses, by civil or administrative rather than criminal mechanisms, notwithstanding that the proscribed conduct also warrants incarceration and other designated criminal penalties. Pursuant to these civil mechanisms, an administrative, rather than a judicial officer, may properly litigate the issues; a preponderance standard, rather than proof beyond a reasonable doubt, generally suffices; and no right to jury trial arises from the Sixth Amendment. *E.g., Sedima, S.P.R.L., v. Imrex Co.*, 473 U.S. 479, 491 (1985) ("[c]onduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard"); *Steadman v. Securities and Exchange Comm'n*, 450 U.S. 91 (1981) (permanently enjoining petitioner from continuing his profession as an investment advisor and forcing divestment of certain investments; administrative agency properly applied preponderance standard to conclude that petitioner violated federal securities laws); *United States v. Regan*, 232 U.S. 37 (1914) (preponderance standard applied to government's suit seeking $1000 penalty for violation of alien immigration act; Sixth Amendment did not apply, even though act designated conduct as a misdemeanor and also provided for criminal prosecution). *See also* 9 J. Wigmore, *Evidence* § 2498 (Chadbourn rev. 1981); *Kelly v. Robinson*, 479 U.S. 36, 107 S.Ct. 353, 362 n.14 (1986).

In this case, for example, Nevada could have chosen an administrative agency, or numerous noncriminal mecha-

nisms, to determine whether to suspend petitioners' licenses [*Bell v. Burson*, 402 U.S. 535, 542-543 (1971); *Mackey v. Montrym*, 443 U.S. 1 (1979)] and could similarly have imposed alternative penalties (except for incarceration) in some proceeding other than the instant prosecutions for drunk driving. Nevada, and all states, must remain free to "address a major social problem *both* by way of an administrative scheme *and* through penal sanctions" [*New York v. Burger*, 482 U.S. ___, 107 S.Ct. 2636, 2649 (1987)] or by whatever combination is deemed most advisable. Consideration of penalties other than incarceration in the "petty offense" analysis might force Nevada and other State legislatures to opt for civil, rather than criminal penalties as a method for allowing a decrease in the number (and thus the burden) of jury trials while salvaging some measure of protection for the public. In any event, since penalties other than incarceration can fall outside of Sixth Amendment protection, it is illogical to consider these penalties in Sixth Amendment "petty offense" analysis.[6]

With respect to criminal fines, petitioners might respond that there is a distinction between a criminal fine and a civil pecuniary penalty which warrants consideration of the former in gauging the seriousness of an offense. Traditionally, a prosecutor may collect a pecuniary penalty only by execution of a civil judgment, whereas he can collect a fine by threat of incarceration for failure to pay, even

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[6] On a more basic level, *amicus* State of New Jersey suggests that noncustodial consequences of conviction be considered, if ever, only if they arise from State action, *e.g.*, from a statute mandating the consequence. Thus, while petitioners argue consideration of increased automobile insurance costs for a Nevada defendant convicted of drunk driving, it appears that these costs do not result from State action, but merely from insurance companies' perception of enhanced risk. Even if State action is involved (as it is in New Jersey), enhanced costs and other measures of a remedial nature are generally deemed by the enforcing State to be civil, and thus fall outside of Sixth Amendment protections. *See, e.g., Clark v. New Jersey Div. of Motor Vehicles*, 211 N.J. Super. 708, 711, 512 A.2d 588, 589 (App. Div. 1986).

if the failure is blameless because the defendant cannot afford to pay. *Cf. Landry v. Hoepfner*, 840 F.2d 1201, 1216 n.30 (5th Cir. 1988) (en banc). However, this Court's opinion in *Bearden v. Georgia*, 461 U.S. 660 (1983), ensures that a defendant who cannot afford to pay will not be incarcerated for that failure unless other penological alternatives are inadequate; and in any event the aggregate term of incarceration for the offense and for the failure to pay cannot exceed the statutory maximum for the offense (which for petty offenses is six months). The diminishing effectiveness of increasing fines, occasioned by the diminishing class of defendants who can afford to pay them and *Bearden*'s due process limitations upon incarceration for the resulting failure to pay, ensures that legislative bodies will not choose short imprisonments and large fines as a mechanism for avoiding jury trials for offenses they deem serious, and thus supports a rule considering only incarceration, and not fines, to distinguish "petty" from "serious" offenses.

Other tests and factors proposed by petitioners and *amici curiae* national and Nevada chapters of the American Civil Liberties Union (A.C.L.U.) for distinguishing "petty" from "serious" offenses are presumably capable of "bright line" formulation, but are laden with negative consequences. For example, a rule requiring juries for all offenses indictable at common law[7] could presumably be a "bright line" rule, although its application would entail difficulty and differences in opinions among legal scholars. *See, e.g., State v. Maier*, 13 N.J. 235, 251-252, 99 A.2d 21, 30 (1953). In any event, difficulty in application is not the primary reason for excluding consideration of this factor.

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[7] Petitioners acknowledge that "the factor of 'indictable at common law' seems to have been abandoned by this Court" (petitioners' brief at 21) and yet argue that "DWI . . . would clearly have been indictable at common law." *Id.*

"Our Constitution was not intended to consecrate the common law's treatment of any specific misconduct and thus to bar legislative revaluation of it in the light of changing conditions and mores." *State v. Owens*, 54 N.J. 153, 159, 254 A.2d 97, 100 (1969), *cert. denied* 396 U.S. 1021 (1970). A contrary rule would reduce a legislature's incentive to decriminalize or lessen the penalties and consequential stigma for conduct once, but no longer, deemed serious. This would diminish respect for the law, since prosecutors and grand juries are loathe to "stigmatize their fellow citizens as criminals for [what they deem to be] a slight offense," and persons victimized by the offensive (but nevertheless petty) conduct are "without the redress that the law contemplated would be accorded [them]." *State v. Maier*, 13 N.J. at 243, 99 A.2d at 25.[8]

An example of the need for revaluation of conduct indictable under the common law may be found in this Court's opinion in *District of Columbia v. Colts*, 282 U.S. 63 (1930). This Court noted that reckless driving "was an indictable offense at common law. . . when horses, instead of gasoline, constituted the motive power." *Id.* at 73. The Court thus concluded that the vehicular infraction of reckless driving was indictable at common law, *id.*, yet surely the Sixth Amendment does not require every State to afford jury trials for this offense, no matter how trivial the penal consequences.

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[8] Since the founding of our Nation, each of New Jersey's constitutions has guaranteed jury trials for criminal prosecutions. *See State v. Maier*, 13 N.J. at 257-258, 99 A.2d at 34. However, our courts, like this Court, have recognized the "petty" offense exception. Thus, the opinions in *Maier* and *Owens* are particularly instructive. "The majority opinion in *Maier* . . . declined to accept the . . . proposition . . . that the Legislature could not downgrade what was a crime at common law to an offense below the grade of crime and refuse a trial by jury." *State v. Owens*, 54 N.J. at 159, 254 A.2d at 100. The Court in *Owens* refused to reconsider this holding.

Indeed, *amicus* State of New Jersey respectfully suggests that this Court's valuation of the nature of reckless driving fifty-eight years ago in *Colts* has not withstood the test of time. Many jurisdictions today do not treat reckless driving as a "serious" offense. *See State ex rel Dean v. City Court of Tucson*, 141 Ariz. 361, 363, 687 P.2d 369, 371 (Ct. App. 1984)("[W]e do not believe that reckless driving is today considered to be 'an act of such obvious depravity that to characterize it as a petty offense would be to shock the general moral sense.' " (quoting *Colts*)); *Justiniano Matos v. Gaspar Rodriguez*, 440 F. Supp. 673, 677 (D.P.R. 1976) ("At the present day, all men and women travel much more rapidly than was possible in the eighteenth century"). *See generally* Annot. *Reckless Driving as Lesser Included Offense of Driving While Intoxicated or Similar Charge*, 10 A.L.R. 4th 1252 (1981). Petitioners and *amici* A.C.L.U., by invoking the "indictable at common law" test, ignore the dynamic social trends which have ameliorated society's attitudes towards reckless driving, yet purport to rely upon the same dynamic social trends in arguing that society's contemporary condemnation of drunk driving renders it "serious" independent of its penalties.

Petitioners would also have this Court consider how society views the offense, and whether it is *malum in se* or *malum prohibitum*. These social judgments are best left to the legislatures. It is better not to "involve judges in applying the same sort of criteria that the legislative branch did in the first place when it fixed the maximum sentence. Legislatures . . . are far better equipped to perform the task . . . [being] more responsive to changes in attitude and more amenable to the recognition and correction of their misperceptions in this respect." *Landry v. Hoepfner*, 840 F.2d at 1209. Moreover, it is not useful for a court "to sample popular opinion to determine how much stigma is attributed to each act of misconduct and thereupon to decide, in some way which escapes us, whether

an offense is more than petty notwithstanding the statute has so treated it. It is for the Legislature alone to assay the public's judgment, and the Legislature does so when it prescribes the legal consequences . . . " *State v. Owens*, 54 N.J. at 160, 254 A.2d at 101.

To argue that this Court's case law has mandated consideration of factors other than penalties is to confuse the goal with the means by which it is accomplished. Admittedly, this Court's case law concerning the right to trial by jury has in the past considered factors such as whether the conduct was indictable at common law, but even then the sole purpose was to gauge the seriousness of the offense. Offenses serious in sixteenth century England are not necessarily serious today; and offenses serious in California are not necessarily serious in Arizona. *Rummel v. Estelle*, 445 U.S. 263, 281-282 (1980). "[T]he classification of state crimes differs widely among the states," *Welsh v. Wisconsin*, 466 U.S. 740, 754 n.14 (1984), and this is entirely proper in our federal system. Thus, "the penalty that may attach to any particular offense seems to provide the clearest and most consistent indication of the State's [evaluation of its seriousness]." *Id.* This is therefore the factor which should determine the right to trial by jury.

Finally, petitioners argue that an offense not otherwise "serious" might become so if the statute (like the Nevada drunk driving statute) requires a mandatory minimum jail term. Aside from contempt proceedings, see *supra* note 5, this Court has always hinged its "petty offense" analysis upon the maximum potential term of incarceration, rather than the term actually imposed, and thus an offense carrying a maximum term of six months should be "petty" regardless of statutory requirements for imposition of a minimum term. A statutory requirement for a minimum term "operates solely to limit the sentencing court's discretion in selecting a penalty within the . . ." petty offense range, *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986),

and should not serve to transform an otherwise "petty" offense into one which is "serious."

Injection of custodial minima into the "petty offense" analysis, and the consequential abandonment of the rule hinging that analysis exclusively upon the maximum authorized term, would likely complicate the administration of justice. It could logically compel consideration of related factors such as *de facto* minima or the standard sentencing practices for other offenses. For example, some defendants would inevitably contend that they were entitled to jury trials for a "petty" offense because a given judge or collection of judges routinely imposed a minimum term, and thus established a *de facto* minimum period of incarceration sufficient to render the "petty" offense "serious." Other defendants would contend that a "petty" offense was "serious" because the term routinely imposed for that offense exceeded that for a "serious" offense uniformly drawing probation or a minimal term.

Consideration of mandatory minimum sentences in the "petty offense" analysis would also lead to problems with respect to "petty" offenses which statutorily require minimum terms only upon the judge's finding of certain aggravating factors.[9] *McMillan* held that the Sixth Amendment does not require a jury trial with respect to the existence of these aggravating factors, *id.* at 93, yet petitioners' argument would illogically compel a jury trial with respect to the offense solely because, in a given case, the prosecutor alleges the existence of these aggravating factors and thus seeks the minimum statutory penalty

[9] For example, New Jersey imposes up to 90 days in jail for a person who operates a motor vehicle during a period in which his license was revoked for drunk driving. However, if the court finds as an aggravating factor that the defendant was involved in an accident resulting in injury to another person, then it must impose a statutory minimum of 45 days in jail. N.J. Stat. Ann. § 39:3-40 (West 1973 & Supp. 1988) (App. A, p 4a).

mandated by their existence. All in all, the problems associated with making mandatory terms relevant for purposes of "petty offense" analysis should foreclose deviation from this Court's rule focusing upon the maximum *potential*, rather than *actual* term imposed.

For these several reasons, this Court should clearly enunciate the bright line rule advanced herein and foreclose consideration of extranous factors such as the maximum fine, the public's alleged perception of the seriousness of the offense, whether the offense was indictable at common law, whether it is *malum in se*, and the circumstances under which it might require imposition of a minimum term of incarceration. Nevada's drunk driving statute for first offenders meets this bright line rule; it authorizes no period of incarceration exceeding six months. Thus, petitioners are not entitled to jury trials.

POINT III

TO THE EXTENT THAT FACTORS OTHER THAN THE MAXIMUM TERM OF INCARCERATION ARE RELEVANT, THEY DO NOT ENTITLE PETITIONERS TO TRIAL BY JURY.

In Point II, *amicus* State of New Jersey has advocated application of a bright line rule exclusively focusing on the maximum term of incarceration to determine whether an offense is "petty," or "serious" enough to warrant a trial by jury. Simultaneously, we have attempted to demonstrate the unworkability of considering other factors which petitioners and *amici* A.C.L.U. have culled from this Court's precedent and seek to include in the "serious offense" equation. In this Point, *amicus* State of New Jersey further suggests that, even if any of these additional considerations are relevant, petitioners are not entitled to jury trials because they misapply the tests they proffer.

With respect to the factor of the inherent seriousness of an offense, *amici* A.C.L.U. point to this Court's opinion in *District of Columbia v. Colts*, 282 U.S. 63 (1930), which held that the offense of driving an automobile recklessly so as to endanger property and individuals was *malum in se*, and argue that it would be wholly incongruous to treat driving while intoxicated as *malum prohibitum*. *Amici* A.C.L.U. ignore the fact that in the process of declaring a certain degree of reckless driving to be *malum in se*, this Court in *Colts* specifically considered and implicitly approved the holding in *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917), which determined that driving while intoxicated was only a petty offense not indictable at common law. *See Landry v. Hoepfner*, 840 F.2d 1201, 1212-1213 (5th Cir. 1988) (en banc). More fundamentally, there is nothing factually or legally inconsistent in placing reckless driving under a different classification from driving while intoxicated. While the concept of recklessness is never suggestive of a benign form of conduct, a person who drives while under the influence does not necessarily endanger the public witn the same degree of immediacy as the reckless driver. *State v. Dively*, 92 N.J. 573, 583, 458 A.2d 502, 507 n.7 (1983) ("Driving while drunk does not necessarily translate into reckless driving. It is possible that a vehicle operated by an inebriated driver is not driven recklessly and obviously there are drivers who are reckless but not drunk."); *State v. Roenicke*, 174 N.J. Super. 513, 517, 417 A.2d 54, 56 (Law Div. 1980) ("The essence of the offense is the impaired condition of defendant's physical coordination or mental faculties rather than the manner in which he is driving").

"Even if an intoxicated person drives his car with utmost care, he can be charged with driving while intoxicated. It is the intoxication, not any outward sign of recklessness, which is the offense." *United States v. Reed*, 617 F. Supp. 792, 798 (D.Md. 1985). According to a study conducted at the University of Colorado, a substantial

number of volunteers undergoing judgment, balance and motor coordination tests performed as well when they were "legally drunk" as when they were sober. Blakeslee, *Scientists Find Key Biological Causes of Alcoholism*, N.Y. Times, Aug. 14, 1984, at C1, col. 1. Therefore, this Court's characterization of reckless driving in *Colts* is not dispositive of whether drunk driving is *malum in se* and does not support the claim that drunk driving offenses are "serious" enough to warrant jury trials. *Compare Rothweiler v. Superior Court*, 100 Ariz. 37, 410 P.2d 479 (1966) (en banc) (jury trials for driving while intoxicated) *with State ex rel Dean v. City Court of Tucson*, 141 Ariz. 361, 687 P.2d 369 (Ariz. Ct. App. 1984) (no jury trials for reckless driving). Indeed, the Fifth Circuit has noted that of the twelve jurisdictions that have passed on the issue of whether drunk driving offenses are innately serious enough to warrant a jury trial apart from the penalties provided, four have responded positively and eight in the negative. *Landry v. Hoepfner*, 840 F.2d at 1219 n.39 (citations omitted). And, in contrast to petitioners' view that *both* reckless driving and driving while intoxicated are serious, we submit that *neither* of these offenses is "serious" in the jury trial context, absent exposure to a period of confinement in excess of six months. See *supra* at 16.

Amici A.C.L.U.'s attempt to define the "seriousness" of driving while intoxicated in terms of this Court's treatment of reckless driving in *Colts* also fails to consider the enactment of .10% *per se* laws in a large majority of states in the country. As noted by petitioners, the latest survey reveals that thirty-nine states and the District of Columbia now define drunk driving offenses not only in terms of the traditional physical impairment criteria, but also as driving with .10% or more by weight of alcohol in one's blood. This newer, alternative method of prosecuting drunk driving cases is separate and distinct from the more common form of proofs which focus upon a defendant's physical symptoms. More precisely, the effect, if any, upon a

person of the alcohol which that person has imbibed is wholly irrelevant to that individual's guilt or innocence, so long as the requisite percentage of alcohol is in the person's system. *See, e.g., Anderjeski v. City Court of Mesa*, 135 Ariz. 549, 663 P.2d 233, 234-235 (1983) (en banc) ("It is possible to have less than .10% blood alcohol content and still be under the influence of intoxicating liquor . . . . On the other hand, a person may have over .10 per cent blood alcohol content and still not have his driving abilities significantly impaired. . . ."); *State v. Abbott*, 15 Or. App. 205, 514 P.2d 355, 357 (1973) ("[T]he question is not whether they are intoxicated, but whether they have [the requisite percentage] of alcohol in their blood.") The emergence of .10% *per se* legislation is further indicative that drunk driving is not a *malum in se* offense.

Finally, the citation by *amici* A.C.L.U. and petitioners to the current strong emphasis on enforcement of drunk driving laws in the country, and on the efforts of national organizations such as M.A.D.D. and S.A.D.D., is also not dispositive of the issue before this Court. There is no doubt that drunk driving is the target of national condemnation. But the public's opinion of the gravity of certain illegal behavior does not mean that the offense is automatically "serious" for purposes of deciding whether its prosecution requires jury trials. As this Court has acknowledged, the concept of a "petty" offense is a term of art for constitutional purposes and does not mean that the offense or punishment is necessarily trivial:

> [T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six month's imprisonment, we have held that these disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications. [*Baldwin v. New York*, 399 U.S. 66, 73 (1970)].

Thus, in classifying offenses as either "serious" or "petty," this Court was not fashioning a test which could be conclusively determined by resort to a public opinion poll. Rather, this Court established a conceptual boundary for "serious" crimes that would constitutionally mandate a jury trial. While petitioners' conduct of driving while intoxicated is by no means trivial, it is nevertheless a "petty" offense which does not entitle them to trial by jury.

Petitioners' invocation of "the existing laws and practices in the Nation" is no more supportive of their cause than is their reliance on the purported inherent "seriousness" of drunk driving. First, as this Court has recently demonstrated, in the context of evaluating the practices of various jurisdictions regarding the same issue, the Court is less concerned with numbers than with the question of whether the approach taken by even a small minority of states is constitutional. *Martin v. Ohio*, 480 U.S. 228, 107 S.Ct. 1098, 1103 (1987), *reh'g denied* 107 S.Ct. 1913 (1987) (upholding as constitutional the requirement that defendant shoulder the burden of proving self-defense even though only two states in the country continue to adhere to this procedure); *Patterson v. New York*, 432 U.S. 197, 201-202 (1977).

Second, the statistics which have been paraded back and forth in this area have been terribly misleading. *Baldwin* itself only considered where in the range of penalties legislatively promulgated the states were drawing the jury trial line. *Baldwin* did not analyze national perception of an identical offense. Indeed, any comparison of various jurisdictions' treatments of the same offense is fraught with risk and unreliability; there are numerous variables contained in laws of different states which simply cannot be compartmentalized and accounted for when such a multi-jurisdictional measurement is made. *Rummel v. Estelle*, 445

U.S. 263, 279-281 (1980); *Solem v. Helm*, 463 U.S. 277, 308-309 (1983) (Burger, C.J., dissenting).

However, to the extent that this analysis is appropriate, it is clear that the numbers offered by petitioners are not supportive of their cause. Surely it is not enough simply to do as petitioners have done and make the general assertion that forty-six of fifty states grant jury trials to drunk drivers. To go only thus far does nothing to satisfy the more pertinent question of exactly under what circumstances jury trials are being provided in these forty-six states. Critical to this inquiry, and left unaddressed by petitioners, is a determination of the maximum penalties attendant to drunk driving offenses in the jurisdictions in which jury trials are allowed. If the possible term of imprisonment is, for example, six years (the maximum term available for a third offender in Nevada), then one need look no further than this Court's ruling in *Baldwin* to recognize that a jury trial is necessary. Only when a state's penalties for drunk driving are *below* the *Baldwin* six month threshold and jury trials are nevertheless provided would that jurisdiction's treatment of drunk driving become significant for purposes of petitioners' analysis.

Amicus State of New Jersey has therefore compiled a list of all jurisdictions which, by virtue of the attendant drunk driving penalties, are in complete conformity with the *Baldwin* rule in determining whether jury trials are warranted. (Appendix C). A second list examines the reasons for granting jury trials in those jurisdictions with drunk driving penalties below the *Baldwin* limit; specifically, an analysis is made as to whether each jurisdiction even recognizes *Baldwin's* "petty" versus "serious" distinction for *any* offense. (Appendix D). A review of the experience of other jurisdictions in this fashion discloses the following results.

Appellate courts in six states have refused to recognize a constitutional right to jury trials for first-offender drunk

drivers. (Appendix B). Of the forty-four remaining states, twenty-two which provide jury trials for first offenders have first-offender penalties *higher* than the *Baldwin* threshold. (Appendix C). Therefore, these jurisdictions are consistent with *Baldwin* and actually support the argument for application of the bright line rule.

The other twenty-two states grant jury trials for first-offender drunk driving cases even though the potential incarceration is below the *Baldwin* line. However, of these twenty-two jurisdictions, nineteen do not recognize *Baldwin's* "petty" versus "serious" distinction for *any* offense and, therefore, are completely useless in gauging these jurisdictions' views of the seriousness of drunk driving. (Appendix D). And only four states have made an affirmative determination that, independent of relevant penalties, drunk driving is innately a "serious" enough offense to warrant a jury trial. *Landry v. Hoepfner*, 840 F.2d at 1218 n.36. Two of these four states allow potential incarceration in excess of six months. *Id.*

Clearly, there is an absence of a national consensus as to just how "serious" or "petty" drunk driving actually is. Petitioners' blanket statement that "most states allow trial by jury in d.w.i. prosecutions" does not take into account the simple reality that a substantial percentage of these states conform with *Baldwin*'s bright line in doing so. Consequently, the "existing laws and practices of the Nation," *Duncan v. Louisiana*, 391 U.S. at 161, compel adherence to the bright line rule.

The arguments above demonstrate the deficiency of petitioners' complex "petty" versus "serious" offense test. Analysis of the additional factors which petitioners propose reveals that these factors provide no legitimate foundation for petitioners' jury trial demand. Consequently, even if this Court were not satisfied to limit the applicable rule to consideration of the maximum authorized term of incarceration, petitioners would not be entitled to trial by jury.

POINT IV

NEVADA HAS A LEGITIMATE STATE INTEREST IN BENCH TRIALS FOR PETTY OFFENSES.

Amici A.C.L.U. and, to a certain extent, petitioners, attempt to minimize Nevada's interest in not providing jury trials for first-offender drunk drivers by claiming that no state interest of constitutional magnitude exists to outweigh a defendant's constitutional right to trial by jury. Their claim is somewhat tautological; obviously, if petitioners are entitled to jury trials, then Nevada has no interest in foreclosing that entitlement. However, petitioners and *amici* A.C.L.U. underrate and oversimplify the value of Nevada's and, inferentially, other states' interests in bench trials for "petty" offenses. Regardless of whether this Court accepts our construction of its case law (Point I), accepts our arguments favoring the bright line rule (Point II), or agrees with our evaluation of other tests proffered by petitioners (Point III), it should definitely reaffirm the State's right to impose bench trials for "petty" offenses.

Whether or not they reach the level of being of constitutional import, financial costs and administrative burdens to the State are properly considered in the jury trial analysis. *Cf. Patterson v. New York*, 432 U.S. 197, 209 (1977); *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976). For example, in New Jersey, where jury trials have never been provided for drunk driving offenses, massive delays would undoubtedly result from the implementation of such a system. *Cf. In re Jones & Laughlin Hourly Pension Plan v. LTV Corp.*, 824 F.2d 197, 202 (2d Cir. 1987). See *supra* note 3. Such a large encumbrance upon a State's criminal justice system, particularly with respect to its attendant delays, directly impacts upon that State's obligation to provide all defendants with another constitutional right, *i.e.*, speedy trials. U.S. Const. amend. VI.

This Court should reaffirm its prior conclusion that whatever disadvantages exist for defendants in terms of the potential penalties they face, in situations where they are charged only with a "petty" offense, these disadvantages are outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. *Baldwin v. New York*, 399 U.S. 66, 73 (1970). Nevada's first-offender drunk driving offense is a "petty" offense, but, in any event, *amicus* State of New Jersey urges this Court to reject petitioners' minimization of the value of administrative burdens and financial costs in the "petty offense" analysis.

CONCLUSION

For the foregoing reasons, *amicus* State of New Jersey respectfully urges this Court to affirm the judgment of the Supreme Court of Nevada.

Respectfully submitted,

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APPENDIX

APPENDIX A

NEW JERSEY STATUTES, COURT RULES, AND CONSTITUTIONAL PROVISIONS CITED IN THIS BRIEF

A. NEW JERSEY STATUTES ANNOTATED

2A:8-21. Jurisdiction of specified offenses

Each municipal court, and the judge or judges thereof, shall have jurisdiction of the following offenses occurring within the territorial jurisdiction of the court:

a. Violations of the motor vehicle and traffic laws;

b. Violations of the fish and game laws;

c. Violations of the ordinances of the municipality wherein the municipal court is located or of the municipalities to which its jurisdiction extends;

d. Violations of disorderly persons offenses and petty disorderly persons offenses in Title 2C of the New Jersey Statutes or any other disorderly persons or petty disorderly persons offense as defined by the laws of this State;

e. Violations of chapters one and four of Title 44, Poor, of the Revised Statutes;

f. Violations of chapters six and seventeen of Title 9, Children, of the Revised Statutes; and

g. Offenses as to which no indictment by a grand jury is required.

2C:43-3. Fines and restitutions

A person who has been convicted of an offense may be sentenced to pay a fine, to make restitution, or both, such fine not to exceed:

a. $100,000.00, when the conviction is of a crime of the first or second degree;

b. $7,500.00, when the conviction is of a crime of the third or fourth degree;

c. $1,000.00, when the conviction is of a disorderly persons offense;

d. $500.00, when the conviction is of a petty disorderly persons offense;

• • •

2C:43-3.1. Additional penalties; collection and disposition by violent crimes compensation board; victim and witness advocacy fund; failure to pay; driver license privileges

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(2)(a) In addition to any other disposition made pursuant to the provisions of N.J.S. 2C:43-2 or any other statute imposing sentences for crimes, any person convicted of any disorderly persons offense, any petty disorderly persons offense, or any crime not resulting in the injury or death of any other person shall be assessed a penalty of $30.00 for each such offense or crime for which he was convicted.

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2C:43-8. Sentence of imprisonment for disorderly persons offenses and petty disorderly persons offenses

A person who has been convicted of a disorderly persons offense or a petty disorderly persons offense may be sentenced to imprisonment for a definite term which shall be fixed by the court and shall not exceed 6 months in the case of a disorderly persons offense or 30 days in the case of a petty disorderly persons offense.

17:29A-35. Merit rating accident surcharge for private passenger automobiles; plans; suspension of license; disposition of funds; amount of surcharge; rules and regulations

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(b)(2) Plan surcharges shall be levied for convictions (a) under R.S. 39:4-50 for violations occurring on or after February 10, 1983, and (b) under section 2 of P.L.1981, c. 512 (C. 39:4-50.4a), or for offenses committed in other jurisdictions of a substantially similar nature to those under R.S. 39:4-50 or section 2 of P.L.1981, c. 512 (C. 39:4-50.4a), for violations occurring on or after January 26, 1984. Surcharges under this paragraph shall be levied annually for a three year period, and shall be not less than $1,000 per year for each of the first two convictions, and not less than $1,500 per year for the third conviction occurring within a three year period. If a driver is convicted under both R.S. 39:4-50 and section 2 of P.L.1981, c. 512 (C. 39:4-50.4a) for offenses arising out of the same incident, the driver shall be assessed only one surcharge for the two offenses. The commissioner may increase the amount of surcharges as he deems necessary to effectuate the purposes of subsection d. of this section and P.L.1983, c. 65 (C. 17:29A-33 et al.), and may, pursuant to regulation, permit the deferral of all or any part of these surcharges as provided in paragraph (1)(a) of this subsection.

If, upon written notification from the Division of Motor Vehicles, mailed to the last address of record with the division, a driver fails to pay a surcharge levied under this subsection, the license of the driver shall be suspended forthwith until the surcharge is paid to the Division of Motor Vehicles; except that upon satisfactory show-

ing of indigency, the Division of Motor Vehicles may authorize payment of the surcharge on an installment basis over a period not to exceed 10 months.

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39:3-40. Driving when license refused, suspended, revoked or prohibited; motor vehicle license revoked; punishment

No person to whom a driver's license has been refused or whose driver's license or reciprocity privilege has been suspended or revoked, or who has been prohibited from obtaining driver's license, shall personally operate a motor vehicle during the period of refusal, suspension, revocation, or prohibition.

No person whose motor vehicle registration has been revoked shall operate or permit the operation of such motor vehicle during the period of such revocation.

A person violating this section shall be subject to the following penalties:

a. Upon conviction for a first offense, a fine of $500.00;

b. Upon conviction for a second offense, a fine of $750.00 and imprisonment in the county jail for not more than five days;

c. Upon conviction for a third offense, a fine of $1,000.00 and imprisonment in the county jail for 10 days;

d. Upon conviction, the court shall impose or extend a period of suspension not to exceed six months;

e. Upon conviction, the court shall impose a period of imprisonment for not less than 45 days,

if while operating a vehicle in violation of this section a person is involved in an accident resulting in personal injury to another person.

Nothwithstanding subsections a. through e., any person violating this section while under suspension issued pursuant to R.S. 39:4-50, upon conviction, shall be fined $500.00, shall have his license to operate a motor vehicle suspended for an additional period of not less than one year nor more than two years, and may be imprisoned in the county jail for not more than 90 days.

39:4-50. Operating or allowing operation by person under influence of liquor or drugs; penalties; alcohol education or rehabilitation; collection of driver's license; rights of discovery; intoxicated driver resource centers

(a) A person who operates a motor vehicle while under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug, or operates a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood or permits another person who is under the influence of intoxicating liquor, narcotic, hallucinogenic or habit-producing drug to operate a motor vehicle owned by him or in his custody or control or permits another to operate a motor vehicle with a blood alcohol concentration of 0.10% or more by weight of alcohol in the defendant's blood, shall be subject:

(1) For the first offense, to a fine of not less than $250.00 nor more than $400.00 and a period of detainment of not less than 12 hours nor more than 48 hours spent during two consecutive days of not less than six hours each day and served as prescribed by the program requirements of the Intoxicated Driver Resource Centers established under subsection (f) of this section and, in the

discretion of the court, a term of imprisonment of not more than 30 days and shall forthwith forfeit his right to operate a motor vehicle over the highways of this State for a period of not less than six months nor more than one year.

(2) For a second violation, a person shall be subject to a fine of not less than $500.00 nor more than $1,000.00, and shall be ordered by the court to perform community service for a period of 30 days, which shall be of such form and on such terms as the court shall deem appropriate under the circumstances, and shall be sentenced to imprisonment for a term of not less than 48 consecutive hours, which shall not be suspended or served on probation, nor more than 90 days, and shall forfeit his right to operate a motor vehicle over the highways of this State for a period of two years upon conviction, and, after the expiration of said period, he may make application to the Director of the Division of Motor Vehicles for a license to operate a motor vehicle, which application may be granted at the discretion of the director, consistent with subsection (b) of this section.

(3) For a third or subsequent violation, a person shall be subject to a fine of $1,000.00, and shall be sentenced to imprisonment for a term of not less than 180 days, except that the court may lower such term for each day, not exceeding 90 days, served performing community service in such form and on such terms as the court shall deem appropriate under the circumstances and shall thereafter forfeit his right to operate a motor vehicle over the highways of this State for 10 years.

If the driving privilege of any person is under revocation or suspension for a violation of any provision of this Title at the time of any conviction for a violation of this section, the revocation or suspension period imposed shall commence as of the date of termination of the existing revocation or suspension period. A court that imposes a term of imprisonment under this section may sentence the person so convicted to the county jail, to the workhouse of the county wherein the offense was committed, to an inpatient rehabilitation program or to an Intoxicated Driver Resource Center or other facility approved by the Director of the Division of Alcoholism in the Department of Health; provided that for a third or subsequent offense a person shall not serve a term of imprisonment at an Intoxicated Driver Resource Center as provided in subsection (f).

A person who has been convicted of a previous violation of this section need not be charged as a second or subsequent offender in the complaint made against him in order to render him liable to the punishment imposed by this section on a second or subsequent offender, but if the second offense occurs more than 10 years after the first offense, the court shall treat the second conviction as a first offense for sentencing purposes and if a third offense occurs more than 10 years after the second offense, the court shall treat the third conviction as a second offense for sentencing purposes.

(b) A person convicted under this section must satisfy the screening, evaluation, referral program and fee requirements of the Division of Alcoholism's Intoxicated Driving Programs Unit, and of the Intoxicated Driver Resource Centers and a program of alcohol education and highway

safety, as prescribed by the Director of the Division of Motor Vehicles. The sentencing court shall inform the person convicted that failure to satisfy such requirements shall result in a mandatory two day term of imprisonment in a county jail and a driver license revocation or suspension and continuation of revocation or suspension until such requirements are satisfied, unless stayed by court order in accordance with Rule 7:8-2 of the N.J. Court Rules, 1969, or R.S. 39:5-22. Upon sentencing, the court shall forward to the Bureau of Alcohol Countermeasures within the Intoxicated Driving Programs Unit a copy of a person's conviction record. A fee of $80.00 shall be payable to the Alcohol Education, Rehabilitation and Enforcement Fund established pursuant to section 3, P.L.1983, c. 531 (C. 26:2B-32) to support the Intoxicated Driving Programs Unit.

(c) Upon conviction of a violation of this section, the court shall collect forthwith the New Jersey driver's license or licenses of the person so convicted and forward such license or licenses to the Director of the Division of Motor Vehicles. The court shall inform the person convicted that if he is convicted of personally operating a motor vehicle during the period of license suspension imposed pursuant to subsection (a) of this section, he shall, upon conviction, be subject to the penalties established in R.S. 39:3-40. The person convicted shall be informed orally and in writing. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of R.S. 39:3-40. In the event that a

person convicted under this section is the holder of any out-of-state driver's license, the court shall not collect the license but shall notify forthwith the director, who shall, in turn, notify appropriate officials in the licensing jurisdiction. The court shall, however, revoke the nonresident's driving privilege to operate a motor vehicle in this State, in accordance with this section. Upon conviction of a violation of this section, the court shall notify the person convicted, orally and in writing, of the penalties for a second, third or subsequent violation of this section. A person shall be required to acknowledge receipt of that written notice in writing. Failure to receive a written notice or failure to acknowledge in writing the receipt of a written notice shall not be a defense to a subsequent charge of a violation of this section.

(d) The Director of the Division of Motor Vehicles shall promulgate rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.) in order to estabish a program of alcohol education and highway safety, as prescribed by this act.

(e) Any person accused of a violation of this section who is liable to punishment imposed by this section as a second or subsequent offender shall be entitled to the same rights of discovery as allowed defendants pursuant to the Rules Governing Criminal Practice, as set forth in the Rules Governing the Courts of the State of New Jersey.

(f) The counties, in cooperation with the Division of Alcoholism and the Division of Motor Vehicles, but subject to the approval of the Division of Alcoholism, shall designate and establish on a county or regional basis Intoxicated Driver Resource Centers. These centers shall have the

capability of serving as community treatment referral centers and as court monitors of a person's compliance with the ordered treatment, service alternative or community service. All centers established pursuant to this subsection shall be administered by a certified alcoholism counsellor or other professional with a minimum of five years' experience in treatment of alcoholism. All centers shall be required to develop individualized treatment plans for all persons attending the centers; provided that the duration of any ordered treatment or referral shall not exceed one year. It shall be the center's responsibility to establish networks with the community alcohol education, treatment and rehabilitation resources and to receive monthly reports from the referral agencies regarding a person's participation and compliance with the program. Nothing in this subsection shall bar these centers from developing their own education and treatment programs; provided that they are approved by the Division of Alcoholism.

Upon a person's failure to report to the initial screening or any subsequent ordered referral, the Intoxicated Driver Resource Center shall promptly notify the sentencing court of the person's failure to comply.

Required detention periods at the Intoxicated Driver Resource Centers shall be determined according to the individual treatment classification assigned by the Bureau of Alcohol Countermeasures. Upon attendance at an Intoxicated Driver Resource Center, a person shall be assessed a per diem fee of $50.00 for the first offender program or a per diem fee of $75.00 for the second offender program, as appropriate.

The centers shall conduct a program of alcohol education and highway safety, as prescribed by the Director of the Division of Motor Vehicles.

The Director of the Division of Alcoholism shall adopt rules and regulations pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C. 52:14B-1 et seq.), in order to effectuate the purposes of this subsection.

39:4-50.8. Conviction for violation of § 39:4-50; surcharge; distribution

Upon a conviction of a violation of R.S. 39:4-50, the court shall collect from the defendant a surcharge of $100.00 in addition to and independently of any fine imposed on that defendant. The court shall forward the surcharge to the Director of the Division of Motor Vehicles who shall deposit $95.00 of the surcharge into a "Drunk Driving Enforcement Fund" (hereinafter referred to as the "fund"). This fund shall be used to establish a Statewide drunk driving enforcement program to be supervised by the director. The remaining $5.00 of each surcharge shall be deposited by the director into a separate fund for administrative expenses.

A municipality shall be entitled to periodic grants from the "Drunk Driving Enforcement Fund" in amounts representing its proportionate contribution to the fund. A municipality shall be deemed to have contributed to the fund the portion of the surcharge allocated to the fund, collected pursuant to this section if the violation of R.S. 39:4-50 occurred within the municipality and the arrest resulting in conviction was made by the member of a municipal police force. The grants from the fund shall be used by the municipality to increase enforcement of R.S. 39:4-

50 by subsidizing additional law enforcement patrols and through other measures approved by the director. The Division of State Police, interstate law enforcement agencies and county law enforcement agencies shall be entitled to periodic grants from the fund in amounts representing their proportionate contribution to the fund. The Division of State Police or county or interstate law enforcement agency shall be deemed to have contributed to the fund the portion of the surcharge allocated to the fund collected pursuant to this section if the arrest resulting in a conviction was made by a member of the Division of State Police or county or interstate law enforcement agency. The grants from the fund shall be used by the Division of State Police or county or interstate law enforcement agency to increase enforcement of R.S. 39:4-50 by subsidizing additional law enforcement patrols and through other measures approved by the director.

The surcharge described herein shall not be considered a fine, penalty or forfeiture to be distributed pursuant to R.S. 39:5-41.

The director shall promulgate rules and regulations in order to effectuate the purposes of this section.

B. NEW JERSEY COURT RULES

2:2-3. Appeals to the Appellate Division from Final Judgments, Decisions, Actions and from Rules; Tax Court

(a) As of Right. Except as otherwise provided by *R.* 2:2-1(a)(3) (final judgments appealable directly to the Supreme Court), appeals may be taken to the Appellate Division as of right

(1) from final judgments of the Superior Court trial divisions, or the judges thereof sitting as statutory agents; the Tax Court; and in summary contempt proceedings in all trial courts except municipal courts;

* * *

2:12-3. Certification of Final Judgments of the Appellate Division

(a) Notice of Petition for Certification: Time for Filing; Contents; Filing Fees. If certification is sought to review a final judgment of the Appellate Division, the petitioner shall, within 20 days after its entry, serve a copy of a notice of petition for certification upon all parties who may be affected by the proceeding and shall file, together with the payment to each court of the appropriate fee pursuant to *N.J.S.A.* 22A:2, the original notice with the Clerk of the Appellate Division and a copy thereof with the Clerk of the Supreme Court.

* * *

3:23-1. Exclusive Method of Review

Except as provided by *R.* 2:2-3(b), review of a judgment of conviction in a criminal action or proceeding in a court of limited criminal jurisdiction shall be by appeal as provided by *R.* 3:23.

3:23-8. Hearing on Appeal

(a) Plenary Hearing; Hearing on Record; Correction or Supplementation of Record; Transcript for Indigents. If a verbatim record or sound recording was made pursuant to *R.* 7:4-5 in the court from which the appeal is taken, the original transcript thereof duly certified as correct shall be filed by the clerk of the court below with the county clerk, and a certified copy served on the

prosecuting attorney by the clerk of the court below within 20 days after the filing of the notice of appeal or within such extension of time as the court permits. In such cases the trial of the appeal shall be heard de novo on the record unless it shall appear that the rights of either party may be prejudiced by a substantially unintelligible record or that the rights of defendant were prejudiced below in which event the court to which the appeal has been taken may either reverse and remand for a new trial or conduct a plenary trial de novo without a jury. The Court shall provide the municipal court with reasons for the remand. The Court may also supplement the record and admit additional testimony whenever (1) the municipal court erred in excluding evidence offered by the defendant, (2) the state offers rebuttal evidence to discredit supplementary evidence admitted hereunder, or (3) the record being reviewed is partially unintelligible or defective. If the appellant, upon application to the court appealed to, is found to be indigent, the court shall order the transcript of the proceedings below furnished at the county's expense if the appeal involves violation of a statute and at the municipality's expense if the appeal involves violation of an ordinance. If no such record was made in the court from which the appeal is taken, the appeal shall operate as an application for a plenary trial de novo without a jury in the court to which the appeal is taken.

* * *

(e) Disposition by Superior Court, Law Division. If the defendant is convicted, the court shall impose a sentence as provided by law. If the defendant is acquitted, the court shall order the defendant discharged, the conviction in the court

below set aside, and the return of all fines and costs paid by the defendant. An appropriate judgment shall be entered and a copy thereof transmitted to the court below.

* * *

7:6-1. Complaint and Summons

(a) Form. In cases involving violations of statutes or ordinances relating to the operation or use of motor vehicles, hereinafter designated as "traffic offenses," the complaint and summons shall be a uniform traffic ticket in the form prescribed by the Administrative Director of the Courts. On a complaint and summons for a nonmoving traffic offense, in lieu of the name of the defendant it shall be sufficient to set forth the license number of the vehicle involved, and it shall be presumed that the owner of the vehicle is the defendant charged with the violation.

(b) Issuance. The complaint may be made and signed by a law enforcement officer, or by any other person, but the summons shall be signed and issued only by such officer, or the judge, clerk or deputy clerk of the court in which the complaint is, or is to be filed. *R.* 7:3 relating to warrants and summons in respect of nonindictable offenses generally, shall be applicable to cases involving a traffic offense, except as otherwise herein provided.

* * *

C. NEW JERSEY CONSTITUTIONAL PROVISIONS

New Jersey Constitution (1947), Art I, para. 10 Rights of persons accused of crime

10. In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

APPENDIX B

STATES THAT DO NOT RECOGNIZE A CONSTITUTIONAL RIGHT TO JURY TRIALS FOR FIRST OFFENSE DRUNK DRIVING.

1. *Florida*: Fla. Stat. Ann. § 316.193(2)(a) 2.a (West Supp. 1988) (first offense driving under the influence subject to imprisonment for not more than six months); *Whirley v. State*, 450 So.2d 836, 839 (Fla. 1984) (person charged with driving with unlawful blood alcohol level has been charged with a "petty offense" and is not entitled to trial by jury under Federal or State Constitutions). *But see State v. Heidrich*, 490 So.2d 1306 (Fla. App. 1986) (Court of Appeals calling into question the continued vitality of *Whirley*, *supra*, in light of subsequent legislative action).

2. *Louisiana*: La. Rev. Stat. Ann. § 14:98.B (West 1986) (authorized maximum period of six months' imprisonment for first offense driving while intoxicated); *City of Monroe v. Wilhite*, 255 La. 838, 233 So.2d 535, 536, *cert. denied* 400 U.S. 910 (1970) (defendant charged with driving automobile under the influence of alcohol not entitled to jury since offense was "petty"); *State v. Landry*, 463 So.2d 761 (La. App. 1985), *cert. denied* 464 So.2d 1373 (La. 1985); *Landry v. Hoepfner*, 840 F.2d 1201 (5th C. 1988) (*en banc*) (where defendant's sentencing exposure was limited to six months and $500, defendant not entitled to trial by jury).

3. *Nevada*: Nev. Rev. Stat. Ann. § 484.3792(1)(a)(2) (Supp. 1988) (first offender drunk driver subject to six months' imprisonment); *Blanton v. North Las Vegas Municipal Court*, 103 Nev. 135, 748 P.2d 494 (1987), *cert. granted*, 108 S.Ct. 2843 (1988).

4. *New Hampshire*: N.H. Rev. Stat. Ann. § 265:82-b (Supp. 1981) (no authorized period of imprisonment); *State v. Morril*, 123 N.H. 707, 465 A.2d 882, 886 (N.H. 1983) (so long as a fine of no more than $500 may be levied against first offense drunk driver, no right to trial by jury).

5. *New Mexico*: N.M. Stat. Ann. § 66-8-102(D) (Supp. 1988) (imprisonment of no more than ninety days); *Hamilton v. Walker*, 65 N.M. 470, 340 P.2d 407 (1959) (no constitutional right to jury trial in drunk driving prosecution).

6. *New Jersey*: N.J. Stat. Ann. § 39:4-50(a)(1) (West 1973 & Supp. 1988) (first offenders subject to potential imprisonment of thirty days); *State v. Rodgers*, 91 N.J.L. 212, 102 A. 433 (E. & A. 1917) (no right to trial by jury); *State v. Linnehan*, 197 N.J. Super. 41, 484 A.2d 34 (App. Div. 1984), *certif. denied* 99 N.J. 236, 491 A.2d 723 (1985); *State v. Zoppi*, 196 N.J. Super. 596, 483 A.2d 844 (Law Div. 1984).

APPENDIX C

STATES IN WHICH THE MAXIMUM AUTHORIZED PERIOD OF CONFINEMENT FOR FIRST OFFENSE DRUNK DRIVING EXCEEDS THE *BALDWIN* THRESHOLD.

1. *Alabama*: Ala. Code § 32-5A-191(c) (1983 & Supp. 1987) (imprisonment in county or municipal jail for not more than one year).
2. *Alaska*: Alaska Stat. § 28.35.030(b) (1984) (drunk driving is a Class A misdemeanor); Alaska Stat. § 12.55.135(a) (1984) (class A misdemeanor punishable by a term of imprisonment not to exceed one year).
3. *Arkansas*: Ark. Stat. Ann. § 5-65-103 (1987); Ark. Stat. Ann. § 5-65-111(a) (1987) (imprisonment not to exceed one year).
4. *Colorado*: Colo. Rev. Stat. § 42-4-1202(1)(a), (b),-(1.5)(a), - (4)(a)(I) (1984) (punishment in the county jail for not more than one year).
5. *Georgia*: Ga. Code Ann. § 40-6-391(c)(1)(B) (1985 & Supp. 1988) (imprisonment for not more than one year).
6. *Illinois*: Ill. Ann. Stat. Ch. 95 1/2, § 11-501 (4) (c) (1988-1989 Supp.) (drunk driving is a Class A misdemeanor); Ill. Ann. Stat. Ch. 38, § 1005-1, 1005-8-3 (1983) (range of appropriate dispositions).
7. *Indiana*: Ind. Code Ann. § 9-11-2-2 (Burns 1988 Supp.) (drunk driving is a Class A misdemeanor); § 35-50-3-2 (1985) (Class A misdemeanor punishable by imprisonment of not more than one year).
8. *Iowa*: Iowa Code Ann. § 321J.2(2)(a) (West Supp. 1988) (DWI is a Serious Misdemeanor); Iowa Code Ann. § 903.1 (West 1979 & Supp. 1988) (punishable by imprisonment of not more than one year).
9. *Maine*: Me. Rev. Stat. Ann. tit. 29, § 1312-B(2) (Supp. 1987) (Class D crime requiring incarceration of not less than forty-eight consecutive hours); Me. Rev. Stat. Ann. tit. 17A, § 1252 (2)(D)(1964 & Supp. 1987) (im-

prisonment of up to one year prescribed for Class D crimes).

10. *Maryland*: Md. Transp. Code Ann. § 21-902(a) (1987) (drunk driving); § 27-101(h)(l) (first offense drunk driving subject to imprisonment of not more than one year).
11. *Massachusetts*: Mass. Gen. Laws Ann. ch. 90, § 24(1)(a)(1) (West 1985) (first offense drunk driving punishable by imprisonment of not more than two years).
12. *New York*: N.Y. Vehicle and Traffic Law § 1192(2),(3),(5) (McKinney 1986 & Supp. 1988) (drunk driving subject to imprisonment of not more than one year).
13. *Oklahoma*: Okla. Stat. Ann. tit. 47, § 11-902(c) (West 1988) (incarceration in county jail for not more than one year).
14. *Oregon*: Or. Rev. Stat. § 813.010(3) (1985) (driving while intoxicated is a Class A misdemeanor); Or. Rev. Stat. § 161.615 (1985) (Class A misdemeanors punishable by maximum term of one year imprisonment).
15. *Pennsylvania*: 75 Pa. Cons. Stat. Ann. § 3731(e)(1) (1988 Supp.) (first offense driving while intoxicated is a second degree misdemeanor); 18 Pa. Cons. Stat. Ann. § 106(b)(7) (authorized term of imprisonment of not more than two years).
16. *Rhode Island*: R.I. Gen. Laws § 31-27-2(d)(1) (Supp. 1987) (first offender drunk driver may be imprisoned for up to one year).
17. *South Dakota*: S.D. Codified Laws Ann. § 32-23-2 (1984 & Supp. 1988) (first offense driving while intoxicated is a Class 1 misdemeanor); S.D. Codified Laws Ann. § 22-6-2 (1988) (Class 1 misdemeanor punishable by imprisonment of up to one year).
18. *Tennessee*: Tenn. Code Ann. § 55-10-403(a)(1) (1980 & Supp. 1987) (first offenders subject to imprisonment in county jail for up to eleven months and twenty-nine days).

19. *Texas*: Tex. Rev. Civ. Stat. Ann. art. 6701l-1 (Vernon Supp. 1988) (first offenders subject to confinement in county jail for not more than two years).
20. *Vermont*: Vt. Stat. Ann. tit. 23, § 1210 (1987) (imprisonment of up to one year).
21. *Virginia*: Va. Code Ann. § 18.2-270 (1988) (driving while intoxicated is a Class one misdemeanor); Va. Code Ann. § 18.2-11 (Class one misdemeanor punishable by imprisonment in county jail for up to twelve months).
22. *Washington*: § 46.61.515(1) (1987) (first offense driving while intoxicated subject to imprisonment of up to one year).

APPENDIX D

STATES WHICH PROVIDE JURY TRIALS FOR FIRST OFFENSE DRUNK DRIVING FOR WHICH THE AUTHORIZED TERM OF CONFINEMENT IS LESS THAN THE *BALDWIN* THRESHOLD

STATE	RECOGNIZES *BALDWIN's* DISTINCTION BETWEEN "PETTY" and "SERIOUS" OFFENSES	SOURCE
1. Arizona	Yes	*Rothweiler v. Superior Court of Pima County*, 100 Ariz. 37, 410 P.2d 479, 482, 486 (1966) (en banc) (right to trial by jury not applicable to "petty" offenses, but drunk driving is a "serious" offense).
2. California	No	*Tracy v. Municipal Court*, 22 Cal.3d 760, 587 P.2d 227, 150 Cal. Rptr. 785 (Cal. 1978) (en banc) (defendant charged with possession of marijuana had right to trial by jury even though offense punishable by only $100 fine); *Mills v. Municipal Court*, 10 Cal.3d 383, 515 P.2d 273, 110 Cal. Rptr. 329 (Cal. 1973) (en banc); Cal. Penal Code § 689 (West 1985).
3. Connecticut	No	Conn. Gen. Stat. Ann. § 54-82b(a) (West Supp. 1988) (no right to trial by jury in criminal actions where maximum penalty is a fine of $199.00).
4. Delaware	Yes	*Thomas v. State*, 331 A.2d 147, 150 (Del. 1975) (potential incarceration for more than six months is the fixed dividing line between "petty" and "serious" crimes). See also *Clements v. Family Court*, 401 A.2d 72, 74 (Del. 1979).
5. Hawaii	Yes	*State v. O'Brien*, 68 Haw. 39, 704 P.2d 883 (Haw. 1985) (driving under influence is constitutionally "serious" offense and defendant so charged has right to trial by jury).
6. Idaho	No	*State v. Bennion*, 112 Idaho 32, 730 P.2d 952, 964 (Idaho 1986) (State constitution guarantees jury trial whenever the possible sanction includes imprisonment).

7. Kansas	No	Kan. Stat. Ann. § 22-3404 (Supp. 1987) (defendant may demand jury trial in misdemeanor and traffic infraction cases); *State v. Dickson*, 9 Kan. App.2d 425, 680 P.2d 313, 314 (Kan. App. 1984).
8. Kentucky	No	Ky. Rev. Stat. Ann. § 29A.270(1)(Mitchie/Bobbs-Merrill 1985) (defendants entitled to trial by jury in all criminal prosecutions, including prosecutions in the circuit and district courts); *Crone v. Commonwealth*, 680 S.W.2d 138, 139 (Ky. Ct. App. 1984).
9. Michigan	No	*People v. Anschutz*, 335 Mich. 375, 56 N.W.2d 224 (1953)(recognizing right to jury trial in prosecution for misdemeanor of providing alcohol to minor); *People v. Schomaker*, 116 Mich. App. 507, 323 N.W. 2d 461 (1982) (constitution guarantees right to trial by jury in all criminal prosecutions).
10. Minnesota	No	*Peterson v. Peterson*, 278 Minn. 275, 153 N.W.2d 825 (Minn. 1967) (State constitution confers right to jury trial in all cases, regardless of gravity).
11. Mississippi	No	*Clark v. State*, 332 So.2d 415 (Miss. 1976) (Mississippi Code sec. 9-9-33 accords to all parties in county court—except in contempt cases—a jury trial when timely demanded and not otherwise waived).
12. Missouri	No	*State v. McClinton*, 418 S.W.2d 55, 60 (Mo. 1967)(en banc) ("since 1870 at least, the defendant in a misdemeanor case has had a statutory right to trial by jury"). *But cf. State ex rel. Cole v. Nigro*, 417 S.W.2d 933, 936 (Mo. 1971) (en banc) (no constitutional right to trial by jury in municipal ordinance cases, but statutory right to trial by jury in third and fourth class cities).
13. Montana	No	*State v. Waymire*, 736 P.2d 106, 107 (Mont. 1987)(appeals from district courts and city courts must be tried anew before a jury); *Hammer v. Justice Court, Lewis and Clark County*,

		720 P.2d 281, 283 (Mont. 1986) (justice courts have jurisdiction over misdemeanors punishable by up to six months).
14. Nebraska	No	*State v. Karel*, 204 Neb. 573, 284 N.W.2d 12, 13 (Neb. 1979) (defendant charged with first offense drunk driving entitled to trial by jury under Neb. Rev. Stat. § 24-536, which accords right to jury in all cases except traffic infractions and criminal cases arising under city or village ordinances).
15. North Carolina	No	*State v. Hudson*, 280 N.C. 74, 185 S.E.2d 189, 192 (N.C. 1971), *aff'd o.g.* 281 N.C. 100 187 S.E. 2d 756 (1972) *cert. denied* 414 U.S. 1160 (1974) (misdemeanors—even petty misdemeanors—initially tried without jury, but defendants afforded trial *de novo* with jury on appeal).
16. North Dakota	No	N.D. Cent. Code § 29-16-01 (1974) (an "issue of fact" arises upon a plea of not guilty); § 29-16-02 (all issues of fact must be tried by jury—whether misdemeanor or felony—unless jury trial waived).

17. Ohio	No	Ohio Rev. Code Ann. § 2945.17 (Page 1987) (accused has right to trial by jury in all cases in which the penalty involved exceeds $100).
18. South Carolina	No	*United States v. Jenkins*, 780 F.2d 472, 474-475 (4th Cir.), *cert. denied* 476 U.S. 1161 (1986) (state statutory right to trial by jury applies to all offenses within magistrate's jurisdiction).
19. Utah	No	*Salt Lake City v. West Gallery, Inc.*, 573 P.2d 1283 (Utah 1978) (criminal cases initiated in district courts entitle defendants to twelve, eight or a lesser number of jurors depending on gravity of offense; a jury of four is provided in criminal cases in City and Justice of the Peace Courts); *State v. Nuttall*, 611 P.2d 722, 724-725 (Utah 1980) (jury of four constitutional for purpose of trying misdemeanor drunk driving offense).
20. West Virginia	No	*Scott v. McGhee*, 324 S.E.2d 710 (W. Va. 1984) (in municipal courts of West Virginia, right to jury trial accorded for both felonies and mis-

		demeanors when the penalty provides for any period of confinement).
21. Wisconsin	No	*State ex rel. Murphy v. Voss*, 34 Wis. 501, 149 N.W.2d 595, 597 (Wis. 1967) (under art. I, § 7 of the Wisconsin Constitution, all defendants are entitled to impartial jury trial, which right extends to the trial of misdemeanors). See also *State v. McAllister*, 107 Wis.2d 532, 319 N.W.2d 865 (Wis. 1982).
22. Wyoming	No	*Brenner v. City of Casper*, 723 P.2d 558 (Wyo. 1986) (crime punishable by *any* jail time is a "serious" offense subject to right to trial by jury pursuant to State constitution).

(13)

No. 87-1437

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MELVIN R. BLANTON and MARK D. FRALEY,
Petitioners,

v.

CITY OF NORTH LAS VEGAS, NEVADA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF OF THE STATE OF NEVADA AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

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I. INTEREST OF AMICUS CURIAE

Nevada law presently precludes jury trials for defendants charged with a first offense of driving under the influence of intoxicating liquor or a controlled substance (DUI). The legislative, judicial and executive branches of the State of Nevada have, respectively, enacted laws, decided controversies, and enforced statutes of this State based upon the evolution of United States Supreme Court law regarding the distinction between "petty" and "serious" offenses and the determination as to whether a defendant is entitled to a jury trial. The Nevada Supreme Court followed this Court's "bright line" test and determined that jury trials are not constitutionally required when the maximum possible jail time upon conviction is six months. A departure from the "bright line" test would have severe consequences for the State of Nevada's legal system

which would involve a restructuring of its entire judicial and legislative framework. Should this Court abandon its "bright line" test in favor of a "collateral consequences" analysis, Nevada courts may have to determine whether such analysis also applies to other crimes previously considered as "petty" offenses. The Nevada Legislature would also have to consider whether its attempts to provide judges with options for punishment, education and rehabilitation of those violating what were "petty" offenses will now be construed as creating "collateral consequences" which might require jury trials.

II. SUMMARY OF ARGUMENT

The existence of a federal constitutional right to a jury trial in a criminal proceeding turns upon the characterization of the offense charged as "serious" or "petty." In determining whether an offense is serious or petty, courts

generally look to the maximum authorized penalty. It is well established that offenses punishable by up to six months imprisonment are "petty" and are not subject to the sixth and fourteenth amendment jury trial requirement. For the purpose of a sixth amendment analysis, the maximum authorized penalty provides the only objective indication of the seriousness of the offense. This objective standard promotes uniformity, objectivity and efficient judicial administration.

A sixth amendment analysis predicated upon a review of the collateral consequences of a conviction is inappropriate. This analysis ignores the legislature's considered judgment as to the seriousness of the offense and the state's overriding interest in efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive non-jury trials.

First offense DUI is punishable in Nevada by up to six months imprisonment and a fine of up to $1000 or both. This statutory penalty, established by the Nevada Legislature, provides the clearest and most consistent judgment as to the seriousness of the offense. The offense of driving under the influence falls within the historic and statutory definitions of "petty" offense and, therefore, there is no federal constitutional right to a jury trial.

III. ARGUMENT

Under Nevada Law, The Misdemeanor Offense Of Driving Under the Influence Is Not A Serious Offense That Would Entitle A Defendant To A Jury Trial.

In Nevada, a first offense of driving under the influence is considered to be a misdemeanor. Punishment for a conviction includes payment of tuition for and attendance in an educational course on abuse of alcohol and controlled substances; a sen-

tence of imprisonment for not less than two days nor more than six months or performance of forty-eight hours of community service; and, a fine of not less than $200 nor more than $1000. Nev.Rev.Stat. § 484.3792 (1987) (reproduced in Appendix A). In addition, a conviction results in a ninety-day revocation of the privilege to drive. Id. § 483.460(1)(c) (reproduced in Appendix B).[1] The prior decisions of this Court dictate that a DUI defendant is not constitutionally entitled to a jury trial.

A. The Nevada Supreme Court Properly Applied The "Bright Line" Test.

The existence of a constitutional right to a jury trial in a criminal pro-

[1]These penalties also are set forth clearly on pages ten and eleven of the Nevada Driving Handbook, with which all prospective Nevada drivers must be familiar in order to pass a required written examination. Nevada Driving Handbook at 10-11 (rev. 8/31/87) (reproduced in Appendix C).

ceeding turns upon the characterization of the offense charged as "serious" or "petty." In Duncan v. Louisiana, 391 U.S. 145 (1968), this Court held that "the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which - were they to be tried in a federal court - would come within the Sixth Amendment guarantee." Id. at 149 (footnote omitted). The Court also reaffirmed the long-established view that there is a category of petty offenses "which is not subject to the Sixth Amendment jury trial provision and should not be subject to the Fourteenth Amendment jury trial requirement here applied to the States." Id. at 159. The Court further found that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." Id.

In subsequent decisions, the Supreme Court concluded that offenses carrying a punishment in excess of six months imprisonment are "serious" and must be tried before a jury. Codispoti v. Pennsylvania, 418 U.S. 506, 512 (1974); Baldwin v. New York, 399 U.S. 66, 68 (1970). In Baldwin, the Court primarily focused on the issue of imprisonment and the necessity of objective criteria on which to make a determination. The Court noted that the overwhelming practice in the nation was to provide a jury trial in any case where the defendant faced a possible sentence in excess of six months. The Court stated:

> This near-uniform judgment of the Nation [that a jury trial is provided when an offense is punishable by imprisonment for more than six months] furnishes us with the only objective criterion by which a line could ever be drawn -- on the basis of the possible penalty alone -- between offenses that are and that are not regarded as "serious" for purposes of trial by jury.

Baldwin v. New York, 399 U.S. at 72-73 (emphasis added). The Court also indicated that the six month dividing line was in accordance with the federal statutory definition of "petty offense" contained in section 1 of Title 18 to the United States Code. Id. at 73 n.21.

In establishing the dividing line between "petty" and "serious" offenses at six months, and hence the right to a jury trial, the Court noted that even "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation." Id. at 73. The Court recognized, however, that the disadvantages resulting from the imposition of a six month dividing line "may be outweighed by the benefits that result from speedy and inexpensive non-jury adjudications." Id.

In Codispoti, the Court stated that "our decisions have established a fixed dividing line between petty and serious offenses: those carrying a sentence of more than six months are serious crimes and those carrying a sentence of six months or less are petty crimes." Codispoti v. Pennsylvania, 418 U.S. at 512 (emphasis added).

In Muniz v. Hoffman, 422 U.S. 454 (1975), the Supreme Court first considered the relationship of the amount of a fine to the determination of whether an offense was "serious" or "petty." At the outset, the Court noted that, in determining whether an offense was "serious" or "petty," the Court has traditionally referred to the definition of a petty offense contained in federal statutes, 18 U.S.C. § (1)(3), which, at the time Muniz was decided, defined petty offenses as those crimes "the penalty for which does not

exceed imprisonment for a period of six months or a fine of not more than $500 or both." Id. at 476. See also Baldwin v. New York, 399 U.S. at 72-73 n.21. The Court rejected, however, the proposition that a crime must be considered serious if it is punishable by a fine in excess of $500. Id. The Court noted that "imprisonment and fines are intrinsically different" and held that a $10,000 fine of a 13,000 member union did not render an otherwise petty offense serious. Muniz v. Hoffman, 422 U.S. at 477.

The Ninth Circuit Court of Appeals relied more strictly upon the provisions of 18 U.S.C. Section 1(3) and held that a fine in excess of $500 renders an otherwise petty offense serious, thereby entitling the defendant to a jury trial. United States v. Hamdan, 552 F.2d 276, 279-80 (9th Cir. 1977). Recognizing the historic devaluation of money, however,

the court stated:

> The value of money changes, of course, as does the wealth of the economy. But Congress can be expected to adjust the monetary standard of [18 U.S.C.] section 1(3) so that it will continue to represent a fair judgment as to the appropriate line between petty and serious offenses.

Id. at 280 n.3. As predicted, Congress subsequently amended the definition of a petty offense to include any misdemeanor the punishment for which does not exceed six months imprisonment or a fine of not more than $5000.00 or both. See 18 U.S.C. § 1(3) (as amended October 30, 1984, Pub. L. 98-596, § 8, 98 Stat. 3138) (reproduced as Appendix D). The Ninth Circuit Court of Appeals has nevertheless retained $500 as the fixed dividing line between petty and serious offenses. See Rife v. Godbehere, 814 F.2d 563, 565 (9th Cir. 1987) (misdemeanor punishable by up to a $1000 fine is a serious offense and therefore

the defendant is entitled to a jury trial).

Recently, the fifth circuit in Landry v. Hoepfner, 840 F.2d 1201 (5th Cir. 1988), stated that a $500 or $1000 fine did not make a difference:

> As noted, the focus is on the confinement, not the fine; further, Muniz sustained a ten thousand dollars fine, and Congress then found five thousand dollars appropriate for petty offenses by individuals. Viewed historially, it is evident that, because of inflation, one thousand dollars today (or in 1984) is worth substantially less than five hundred dollars was both when Congress first used that figure in 18 U.S.C. § 1 (which was at least as early as 1948) and when Baldwin was decided in 1970.

Id. at 1216 n.30.

Under the Nevada Statute at issue here, a defendant charged with first offense DUI is exposed to a maximum punishment of not more than six months in jail and a fine of not more than $1000. In determining whether the defendant has a

constitutional right to a jury trial, this Court should re-affirm the "bright line" test approved by the decisions in Baldwin, Codispoti, Muniz and Hamdan and uphold the decision of the Nevada Supreme Court which followed this rationale. Because the maximum potential punishment is less than six months and a fine considerably less than the $5000 limit contained in 18 U.S.C. § 1(3), the offense must be characterized as petty. Therefore, there is no federal constitutional right to a jury trial. United States v. Fletcher, 505 F.Supp. 1053, 1054 (W.D.Va. 1981); Matos v. Rodriguez, 440 F.Supp. 673, 676 (D.P.R. 1976).

B. The Nevada Federal District Court Has Improperly Applied A "Collateral Consequences" Analysis.

Federal courts have split on the issue of whether DUI is a "serious" offense such that the Constitution requires

that a jury trial be provided. A few courts have concluded that DUI on a public road is malum in se and, additionally, that the so-called "collateral consequences" attendant upon a conviction (mandatory incarceration, revocation of drivers license, system of increasing penalties for subsequent offenses, increasing insurance premiums and public notoriety) justify classifying DUI as serious. See United States v. Craner, 652 F.2d 23 (9th Cir. 1981); Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986).

In Bronson v. Swinney, the district court held that a defendant charged with a first offense DUI pursuant to section 484.3792 of the Nevada Revised Statutes had a federal constitutional right to a jury trial. Bronson v. Swinney, 648 F.2d at 1100. In reaching its decision, the court relied heavily upon the ninth circuit's decision in Craner. Id. at 1097-

98. The district court in Bronson noted that the maximum authorized penalty was the most important factor in determining whether an offense is serious or petty for sixth amendment analysis, but held that other factors such as the collateral consequences of a conviction, nature of the offense and treatment of the offense at common law could also be considered. Id. at 1098-99. The court concluded that the consequences of a conviction for DUI, which included an automatic driver's license revocation, a mandatory jail sentence, a system of increasing penalties for subsequent convictions, and "the opprobrious nature of the offense," indicate it is considered a "serious" offense by the people of the State of Nevada and, therefore, the sixth and fourteenth amendments require a jury trial. Id. at 1100.

The district court's reliance on Craner was misplaced. In Craner, the

ninth circuit held that DUI within Yosemite National Park, which was punishable by six months imprisonment or a $500 fine or both, was a "serious" offense for which the Federal Constitution required a jury trial. This penalty was set by the Secretary of the Interior and not by Congress. As such, the court concluded that there was no assurance that the penalty represented "a considered legislative judgment of the gravity of the offense." United States v. Craner, 652 F.2d at 25. The court held that the possibility of having a drivers license revoked by the State of California as a result of the federal court conviction constituted an "additional consequence" which justified classifying the crime as serious and entitling the defendant to a jury trial. Id. at 25-26, 28.

The Craner decision, however, did not create a per se rule that the collateral

consequences of a misdemeanor conviction transform a "petty" offense into a "serious" offense thereby requiring a jury trial. United States v. Rodriguez-Rodriguez, 742 F.2d 1194, 1195 (9th Cir. 1984). There are two significant factors which distinguish the present cases from Craner. First, the offense of DUI has been classified by the Nevada Legislature as a misdemeanor. This constitutes "a considered legislative judgment of the gravity of the offense." United States v. Arbo, 691 F.2d 862, 864 (9th Cir. 1982). In Craner, "[g]iven the lack of legislative judgment, there was good reason 'to diminish the importance of the maximum penalty in determining whether' the offense was 'petty' and to 'focus on the additional consequences that attend[ed] conviction of [the] offense.'" Id., quoting United States v. Craner, 652 F.2d at 28 (Sneed, J., concurring).

In light of the Nevada legislative judgment of the gravity of the offense, the importance of the maximum penalty is not diminished and, therefore, a court should not consider the collateral consequences of the conviction. See United States v. Craner, 652 F.2d at 28 (Sneed, J., concurring) (if the maximum penalty reflected a considered legislative judgment, DUI offense would be considered petty regardless of the collateral consequences).

The most recent federal court to consider this issue was the fifth circuit in Landry. Landry was convicted of violating Louisiana Revised Statutes Section 14:98 which authorizes a maximum sentence of six months' imprisonment and a $500.00 fine. The statute also provides for a minimum incarceration of ten days unless the offender participates in both driver improvement and substance abuse programs,

and performs community service work. The offender is ordinarily assessed administrative costs.

The Landry court stated its approval of the United States Supreme Court's "bright line" test and noted, "the Court has never held or stated any crime is a 'serious' rather than a 'petty' offense on the basis of any criteria other than whether its maximum authorized confinement exceeded six months or whether it was indictable at common law." Landry v. Hoepfner, 840 F.2d at 1209. The Landry court stated that, to add a third criterion -- the judicial perception of the seriousness of the offense "is to inject an inherently and inescapably subjective and imprecise factor into the calculus. Essentially, this would involve judges in applying the same sort of criteria that the legislative branch did in the first place when it fixed the maximum sentence."

Id. The court emphasized the right of each state legislature to determine what conduct shall be punishable within its borders: "What is 'serious' in Vermont may not be 'serious' in Louisiana, in terms either of a particular problem's concrete manifestations or of the popular perception or evaluation of it in each of those states." Id. at 1210. While recognizing the gravity of the problem of drunken drivers, the Landry court nonetheless stated,

> The nature of the governmental response to the problem . . . is a matter for legislative determination . . . . Moreover, the problem is not necessarily the same in each state. . . and even if it were, this would not require each state to address it in the same fashion. There is more than one way to skin a cat.

Id. at 1213 n.25.

The argument that recent years have been characterized by a strong public outcry against drunk drivers does not make

the offense malum in se as DUI may not, in and of itself, result in harm.[2] Driving under the influence of liquor is not an inherently evil and injurious act as the act itself does not necessarily injure another person and is not universally considered as immoral. Nonetheless, driving under the influence carries enough potential for harm that it is, in the State of Nevada as well as in other states, prohibited conduct. And the legislature of each state has, after evaluating various relevant factors, such as public opinion, the state's judicial framework, and the practicality and desir-

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[2] Malum In Se is defined as a "wrong in itself; an act . . . involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. An act . . . inherently and essentially evil, that is, immoral in its nature and injurious in its consequences . . . . Such are most or all of the offenses cognizable at common law. . .as murder, larceny, etc." Black's Law Dictionary at 865 (5th ed. 1979).

ability of various methods of punishing the offense, enacted code sections appropriate to that state.

The Nevada Supreme Court, in deciding this case below, cited numerous other jurisdictions which had reached the conclusion that there is no right to jury trial for misdemeanor DUI defendants. Blanton v. North Las Vegas Muncipal Court, 103 Nev. ___,___, 748 P.2d 494, 503 (Adv. Op. at 14, 1987). The Nevada Supreme Court further stated that ". . .we have respectfully concluded that Bronson, and the decisions of the 9th Circuit panels upon which the federal district court relied, represent an unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin." Id. at ___, 748 P.2d at 500 (Adv.Op. at 10).

A second factor distinguishing the present cases from Craner is the existence of a significant fiscal impact on the

State of Nevada. The United States Supreme Court has recognized that the six-month dividing line between petty and serious offenses strikes a balance between the legitimate interests of the state and the rights of the defendant. See Duncan v. State of Louisiana, 391 U.S. at 160. See also Baldwin v. New York, 399 U.S. at 73.

In the present case, it is respectfully submitted that the balancing of interests tips significantly in the favor of the State of Nevada. Even the court in Bronson noted the significant financial impact its decision would have upon the state, counties and municipalities. Bronson v. Swinney, 648 F.Supp. at 1100. First offense DUI prosecutions in Nevada are not a "comparative rarity" as was the case in Craner. There is a further impact upon the interests of the State of Nevada by the fact that municipal courts, which

also handle misdemeanor DUI cases, are precluded by law from holding jury trials. Nev.Rev.Stat. § 266.550 (1987). Accordingly, as noted by the Nevada Supreme Court, the benefits of efficient law enforcement and financial savings from non-jury trials clearly outweigh the disadvantages to the individual defendant charged with a petty offense. Blanton v. North Las Vegas Municipal Court, 103 Nev. at ____, 748 P.2d at 501-02 (Adv.Op. at 11-14).

If this Court decides to abandon the bright line test in favor of a collateral consequences type of review, it is respectfully requested that the court consider several factors, not considered by the court in Bronson, which mitigate the impact of the asserted "collateral consequences." First of all, most first time offenders are receiving a sentence substantially less than the maximum potential

sentence. In the vast majority of these cases, the defendants are receiving a jail term of less than five days and a fine of approximately $500. Community service is also available in lieu of incarceration. Nev.Rev.Stat. § 484.3792(1)(A)(2) (1987). As a result of this alternative, many first-time offenders avoid serving any jail time. Lastly, the inconvenience of driver's license revocation can be minimized by the issuance of a restricted license. Id. § 483.490 (1987) (reproduced as Appendix E). A defendant may receive a restricted license to drive a motor vehicle to and from work or in the course of his work, and to acquire food and medical care for himself or an immediate family member after half the period of the revocation has expired. Id.

As a practical matter, the consequences which face a first-time DUI offender in Nevada represent what the people

of this state, through their legislature, believe to be an effective and innovative method of decreasing the probability that a second DUI offense will occur. A great deal of flexibility is given the judge in fashioning a sentence appropriate to the circumstances, so that education and rehabilitation rather than strictly punishment-by-incarceration may be accomplished. The collateral consequences attendant to a first-time DUI conviction in Nevada are for the most part treated as alternatives to incarceration, not additions to incarceration. The federal district court failed to consider these factors properly in Bronson. That decision should not be followed.

C. The Supreme Court Should Re-Affirm The Bright Line Test As To When The Right To Jury Trial Attaches.

Only the "bright line test" which looks to the maximum authorized penalty,

promotes the interests of uniformity, objectivity and practical judicial administration. A collateral consequences review, similar to that employed by the courts in Craner and Bronson, is not an equitable or practical method of determining whether there is a constitutional right to a jury trial. As such, amicus respectfully suggests that the bright line test be applied to resolve the issue in this case.

Given the complexity of our modern criminal statutes, almost every misdemeanor conviction carries collateral consequences, the most serious of which may subject the defendant to a more severe penalty if subsequent crimes are committed. See id. § 207.010 (repeat misdemeanor offenses punishable as felony). In addition, drivers convicted of multiple driving offenses within one year can be subjected to license revocation pursuant

to the state's demerit points system. Id. §§ 483.473; 483.475. The punishment for a person under twenty-one years of age convicted of possession of less than one ounce of marijuana includes the possible suspension of his or her driver's license for up to six months. Id. § 453.336(3)(a)(2).

Similarly, the violation of any criminal statute must be viewed by society as a serious matter. If the court adopts a collateral consequences analysis, it may be necessary to review each misdemeanor offense to determine if the consequences of a particular conviction render the offense "serious." Such a procedure would be subjective, burdensome and unworkable. United States v. Hamden, 552 F.2d at 279-80.

The subjectiveness and unpredictability of the collateral consequences analysis is further evidenced by a review of

what courts consider to be significant collateral consequences. Courts have held that an extended sentence of probation, which is potentially a very significant infringement of personal freedom, is insufficient to classify a petty offense as serious. See Frank v. United States, 395 U.S. 147 (1969); United States v. Jenkins, 734 F.2d 1322 (9th Cir. 1983), cert. denied, 469 U.S. 1217 (1985). Similarly, the notably serious collateral consequences of conviction for crossing the border illegally does not entitle an alien to a jury trial. United States v. Rodriguez-Rodriguez, 742 F.2d at 1195.

The Supreme Court has consistently held that the maximum authorized penalty provides the clearest, most objective indication of the seriousness of the offense. See Ludwig v. Massachusetts, 427 U.S. 618, 624-625 (1976) (no right to jury trial for petty offenses which is defined

by reference to the maximum authorized punishment); Frank v. United States, 395 U.S. at 148 (severity of the authorized penalty is the most relevant indication of the seriousness of an offense). The right to a jury should not be dependent upon the subjective values of an individual judge. The maximum authorized sentence is the only objective benchmark of the seriousness of a criminal offense. This standard promotes the interest of uniformity, objectivity and judicial administration.[3]

CONCLUSION

Based upon the analysis above, the State of Nevada as amicus curiae respectfully urges the Court to affirm the judgment below of the Nevada Supreme Court.

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[3] Should this Court decide to reverse the decision of the Nevada Supreme Court and hold that a collateral consequences analysis is appropriate, the Court at some time will have to decide whether its ruling is retroactive. See Solem v. Stumes, 465 U.S. 638, 643 (1984).

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APPENDICES

APPENDIX A

Nev.Rev.Stat. § 484.3792 (1987)

Section 484.3792: Driving under the influence of intoxicating liquor or controlled substance: Penalties; segregation of offender; probation, suspension of sentence and plea bargaining restricted; intermittent confinement; consecutive sentences.

1. Any person who violates the provisions of NRS 484.379:

(a) For the first offense within 7 years, is guilty of a misdemeanor. Unless he is allowed to undergo treatment as provided in NRS 484.3794, the court shall:

(1) Except as otherwise provided in subsection 6, order him to pay tuition for an educational course on the abuse of alcohol and controlled substances approved by the department and complete the course within the time specified in the order and the court shall notify the department if he fails to complete the course within the

specified time;

(2) Unless the sentence is reduced pursuant to NRS 484.3794, sentence him to imprisonment for not less than 2 days nor more than 6 months in jail, or to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having violated the provisions of NRS 484.379; and

(3) Fine him not less than $200 nor more than $1,000.

The teacher of the educational course shall evaluate the offender and, if he finds the offender is an abuser of alcohol or controlled substances, he shall promptly report his findings to the court for its use.

(b) For a second offense within 7 years, is guilty of a misdemeanor. Except as provided in NRS 484.3794, the court shall sentence him to imprisonment for not less than 10 days nor more than 6 months in

jail and fine him not less than $500 nor more than $1,000.

(c) For a third or subsequent offense within 7 years, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years and must be further punished by a fine of not less than $2,000 nor more than $5,000. An offender so imprisoned must be segregated insofar as practicable from offenders whose crimes were violent, and must be assigned to an institution of minimum security or, if space is available, to an honor camp restitution center or similar facility.

2. Any offense which occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convic-

tions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing and, if the principal offense is alleged to be a felony, must be shown at the preliminary examination or presented to the grand jury.

3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended except, as provided in NRS 4.373 and 5.055, a portion of the sentence imposed that exceeds the mandatory minimum. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported

by probable cause or cannot be proved at the time of trial.

4. Any term of confinement imposed under the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace, except that a person who is convicted of a second or subsequent offense within 7 years must be confined for at least one segment of not less than 48 consecutive hours. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the offender, but any sentence of 30 days or less must be served within 6 months after the date of conviction or within 6 months after the date of sentencing if the offender underwent treatment pursuant to NRS 484.3794. Any time for which the offender is confined must consist of not less than 24 consecutive hours.

5. Jail sentences simultaneously imposed under this section and NRS 483.560 or 485.330 must run consecutively.

6. If the person who violated the provisions of NRS 484.379 possesses a driver's license issued by a state other than Nevada and does not reside in Nevada, in carrying out the provisions of subparagraph (1) of paragraph (a) of subsection 1, the court shall:

(a) Order the person to pay tuition for and submit evidence of completion of an educational course on the abuse of alcohol and controlled substances approved by a governmental agency of the state of his residence within the time specified in the order; or

(b) Order him to complete an educational course by correspondence on the abuse of alcohol and controlled substances approved by the department within the time specified in the order, and the court shall

notify the department if the person fails to complete the assigned course within the specified time.

7. As used in this section, unless the context otherwise requires, "offense" means a violation of NRS 484.379 or 484.3795 or homicide resulting from the driving of a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct.

APPENDIX B

Nev.Rev.Stat. § 483.460

Section 483.460 Mandatory revocation of license, permit or privilege to drive; periods of revocation.

1. Unless otherwise provided by statute, the department shall revoke the license, permit or privilege of any driver upon receiving a record of his conviction of any of the following offenses, when that conviction has become final, and the driver is not eligible for a license, permit or privilege to drive for the period indicated:

(a) For a period of 3 years if the offense is:

(1) Violation of NRS 484.3795 or subsection 2 of NRS 484.377 or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance.

(2) A third or subsequent violation within 7 years of NRS 484.379.

(b) For a period of 1 year if the offense is:

(1) Any other manslaughter resulting from the driving of a motor vehicle or felony in the commission of which a motor vehicle is used, including the unlawful taking of a motor vehicle.

(2) Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or bodily injury of another.

(3) Perjury or the making of a false affidavit or statement under oath to the department under NRS 483.010 to 483.630, inclusive, or under any other law relating to the ownership or driving of motor vehicles.

(4) Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving committed within a period of 12 months.

(5) A second violation within 7 years of NRS 484.379 and the driver is not eligible for a restricted license during any of that period.

(c) For a period of 90 days, if the offense is a first violation within 7 years of NRS 484.379.

APPENDIX C

Nevada Driving Handbook (Rev. 8-87)

DRINKING AND DRIVING

The penalty for driving under the influence of alcohol and/or drugs is severe. There are two penalties which can occur with each offense. First, an administrative penalty (license revocation), secondly, a criminal penalty (court conviction).

Administrative Penalty

When a law enforcement officer requests a driver to submit to a chemical test of his blood alcohol content, the driver is required to take the test by law (see Implied Consent Law, page 11).

If the driver is found to have 0.10 or more percent blood alcohol content ,the driver's privilege to drive is immediately revoked. The law enforcement officer is

authorized to take the license at the time of arrest.

The period of revocation is 90 days.

Criminal Penalty

First offense within seven years:

Jail sentence: Two days to six months (or 48 hours community service);

Fine: $200 to $1,000;

DUI school: Tuition average is $150;

License revocation: 90 days.

Second offense within 7 years:

Jail sentence: Ten days to six months;

Fine: $500 to $1,000;

License revocation: One year.

Third or more offense within 7 years:

Prison sentence: One year to six years;

Fine: $2,000 to $5,000;

License revocation: Three years.

DUI causing death or serious injury:

Prison sentence: One year to twenty years;

Fine: $2,000 to $5,000;

License revocation: Three years.

If an individual receives a license revocation for the administrative penalty and also for the criminal penalty, the revocation periods run concurrently.

A restricted license can be issued after serving one-half of the revocation period, however, a restricted license cannot be given on a second offense.

APPENDIX D

Section 1, 18 U.S.C., provides:

Notwithstanding any Act of Congress to the contrary:

(1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.

(2) Any other offense is a misdemeanor.

(3) Any misdemeanor, the penalty for which, as set forth in the provision defining the offense, does not exceed imprisonment for a period of six months or a fine of not more than $5,000 for an individual and $10,000 for a person other than an individual, or both, is a petty offense.

APPENDIX E

Nev.Rev.Stat. § 483.490 (1987)

Section 483.490 Period of suspension or revocation: issuance of restricted license upon evidence of hardship; penalties.

1. Unless otherwise provided by specific statute, the department may not suspend a license for a period of more than 1 year.

2. After a driver's license has been suspended or revoked for an offense other than a second violation within 7 years of NRS 484.379 and half the period during which the driver is not eligible for a license has expired, the department may, unless the statute authorizing the suspension prohibits the issuance of a restricted license, issue a restricted driver's license to an applicant permitting the applicant to drive a motor vehicle:

(a) To and from work or in the course of his work or both; or

(b) To acquire supplies of medicine or food or receive regularly scheduled

medical care for himself or a member of his immediate family. Before a restricted license may be issued, the applicant must submit sufficient documentary evidence to satisfy the department that a severe hardship exists because the applicant has no alternative means of transportation and that the severe hardship outweighs the risk to the public if he is issued a restricted license.

3. A driver who violates a condition of a restricted license issued under subsection 2 or by another jurisdiction is guilty of a misdemeanor, and if his license was suspended or revoked for a violation of NRS 484.379, 484.3795, 484.384 or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct, he shall be punished in the

manner provided by subsection 2 of NRS 483.560.

4. The periods of suspensions and revocations under this chapter and under NRS 484.384 must run consecutively, except as provided in NRS 483.465 and 483.475, when the suspensions must run concurrently.

5. Whenever the department suspends or revokes a license, the period of suspension, or of ineligibility for a license after the revocation, begins upon the effective date of the revocation or suspension as contained in the notice thereof.